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Supreme Court of the United States

October Term, 1968

No. 1045

PETER OTTLEY, as President, and PETER BYRNE, as Secretary-Treasurer, of Local 144, Hotel & Allied Service Employees Union, Service Employees International Union, AFL-CIO,

Appellant,

against

THE LONG ISLAND COLLEGE HOSPITAL,

Appellee.

IN THE MATTER OF

PETER OTTLEY, as President, and PETER BYRNE, as Secretary-Treasurer, of Local 144, Hotel & Allied Service Employees Union, Service Employees International Union, AFL-CIO,

Appellant,

against

THE LONG ISLAND COLLEGE HOSPITAL,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

STEPHEN C. VLADECK,
Attorney for Appellant,
165 West 46th Street,
New York, N. Y. 10036.

JUDITH P. VLADECK,
BERNARD YAKER,
VLADECK, ELIAS, FRANKLE,
VLADECK & LEWIS,
Of Counsel.

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Supreme Court of the United States

OCTOBER TERM, 1968

No. .....

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JURISDICTIONAL STATEMENT

Appellant, Local 144, Hotel & Allied Service Employees Union, S. E. I. U.* AFL-CIO, pursuant to United States Supreme Court Rules 13(2) and (15), files this its state-

* During the course of the litigation, the name of the Appellant was changed from Building Service Employees International Union to Service Employees International Union.

ment to show that the United States Supreme Court has jurisdiction of these direct appeals to review the final orders of the Court of Appeals of the State of New York entered on October 14, 1968 in the Office of the Clerk of the Court of Appeals and that substantial federal questions are presented.

Opinions Below

The opinion of the Court of Appeals of the State of New York is reported in 23 N. Y. 2d 20, 294 N. Y. S. 2d 297. The opinion of the Supreme Court, New York County, in *Long Island College Hospital etc.* v. *Catherwood, etc.,* (New York County Clerk's Index No. 13058/1965) is not reported. The Appellate Divisions' decision is reported in 28 App. Div. 2d 1092, 283 N. Y. S. 2d 1014. No opinion was rendered.

The opinions of the Appellate Division of the State of New York, First Department, and the Supreme Court of the State of New York, New York County, respectively, in the *Matter of Long Island College Hospital etc.* v. *Catherwood,* (New York County Clerk's Index No. 12953/1967) are reported in 29 App. Div. 2nd 642, 287 N. Y. S. 2d 313, and 54 Misc. 2d 712, 283 N. Y. S. 2d 249. Copies of all of the foregoing opinions and the final orders appealed from are set forth in Appendix A hereto.

Jurisdiction

Appellee commenced an action in *Long Island College Hospital* v. *Catherwood* (New York County, Index No. 13058/65) seeking, in part, a judgment declaring that Section 716 of the New York State Labor Relations Act (Labor Law, §716) had no application to the dispute between it and appellant, and that the Industrial Commissioner had no authority to appoint a Fact-Finding Commission to inquire into the dispute.

Appellee sought, in part, the alternative relief of a judgment declaring that Labor Law, §716 violated the Constitution of the United States or that the New York State Labor Relations Act (Labor Law, §700 et seq.) as amended in 1963, and as applied to appellee, violated the constitution.

Appellee also commenced a special proceeding, *In the Matter of Long Island College Hospital etc.* v. *Catherwood* (New York County Index No. 12953/67), pursuant to Articles 78 and 75 of the New York Civil Practice Law and Rules to enjoin the Industrial Commissioner and the New York State Mediation Board from taking any steps designed to require compulsory arbitration of the dispute between Appellee and Appellant on the grounds, among others, that Labor Law §716 violated the Constitution of the United States.

Separate appeals in the foregoing two cases were taken by Appellee. Nevertheless, the cases were consolidated for the purpose of argument by the Court of Appeals of the State of New York, and the Court of Appeals rendered one decision and opinion. The final orders of the Court of Appeals appealed from herein were entered on October 14, 1968. While sustaining Appellee's position that Labor Law, §716 was not applicable to the dispute, the Court of Appeals upheld the constitutionality of section 716 by failing to rule expressly on the constitutional arguments proffered by Appellee. Appellant Local 144, and the State officials, moved for reargument or for an amendment of the remittitur on the grounds that Labor Law §§713 and 716, as construed by the Court of Appeals, violated rights guaranteed by the First and Fourteenth Amendments of the Constitution of the United States. That motion was summarily denied, the Court making no reference to the constitutional questions, and refusing to amend its remittitur so as to reflect its consideration of the constitutional questions created by its construction of the statutory sections.

The order denying Appellant's motion was made and entered in the Office of the Clerk of the Court of Appeals on November 20, 1968 (23 N. Y. 2d 741). The motion for leave to reargue, and the order denying the motion are part of the record filed herewith. Notices of appeal in both cases were filed in the Office of the County Clerk and Clerk of the Supreme Court, New York County on February 3, 1969.

The Supreme Court of the United States has jurisdiction to review by appeal the final orders complained of by virtue of the provisions of 28 U. S. C. Section 1257(2). The following decisions are believed to sustain the jurisdiction of the Supreme Court to review the final orders in this by appeal: *Largent* v. *Texas,* 318 U. S. 418; *Lawrence* v. *State Tax Commission,* 286 U. S. 276; *Brinkerhoff-Faris Trust Co.* v. *Hill,* 281 U. S. 673; *Great Northern R. Co.* v. *Sunburst Oil Co.,* 287 U. S. 358; *Missouri ex rel Missouri Insurance Co.* v. *Gehner,* 281 U. S. 313; *Bakery and Pastry Drivers (Local 802)* v. *Wohl,* 315 U. S. 769; *Senn* v. *Tile Layers Protective Union,* 301 U. S. 468; *American Federation of Labor* v. *American Sash & Door Co.,* 335 U. S. 538.

Statutes Involved

New York State Labor Relations Act (Labor Law, §§713 and 716) are set forth in Appendix B hereto.

Questions Presented

(1) May a state constitutionally prohibit employees of voluntary hospitals from striking, picketing or effectively publicizing their disputes with their employers, and require them instead to submit to fact-finding or compulsory arbitration; may a state impose such requirement even though the fact-finding or arbitration may be deferred for a period of years from the onset of the dispute?

The question, specifically stated, is: Where the State of New York has by statute prohibited workers in voluntary hospitals from striking, picketing, or effectively publicizing their differences with their employers, and substituted fact-finding and compulsory arbitration, are those substitutes to strikes, picketing and publicity reasonable alternatives under the First and Fourteenth Amendments of the United States Constitution?

(2) Under the circumstances of Question (1), may a state impose upon a labor organization the requirement that its certification as representative of a majority of employees in an appropriate bargaining unit be subjected to compulsory judicial review, which procedure may require several years, before the labor organization is deemed to have an enforceable right to act as such representative in invoking fact-finding or arbitration as substitutes for strike or other concerted activity?

(a) May a state accomplish this purpose, if permissible, by requiring a labor organization to charge an employer with the commission of unfair labor practices, giving rise to the employer's right to challenge the union's certification?

(b) May a state make such requirement applicable only to unions representing workers in voluntary hospitals?

Statement of the Case

In 1963, New York State enacted changes in the Labor Relations Act so as to extend its coverage to employees in voluntary hospitals (State Labor Relations Act, as amended, L. 1963, ch. 515, Appendix B, A 37-40, *infra*).

For the first time, employees in voluntary (non-profit-making) hospitals were permitted to invoke the procedures of the State Labor Relations Board, and unions of workers

in voluntary hospitals could become certified as bargaining representatives of such employees (Labor Law, §705).

At the same time, two other amendments were enacted: section 713 makes it unlawful for employees of voluntary hospitals to strike or picket and limited the giving of publicity to their disputes with their employers; section 716 (a new section)provides that all collective bargaining agreements between employees of voluntary hospitals and their employers shall be deemed to provide for arbitration of grievances, and that in the absence of a collective bargaining agreement, the Industrial Commissioner of the State of New York is empowered to appoint a fact-finding commission or to submit the dispute to compulsory arbitration. Section 716 was the first statutory requirement of compulsory arbitration in labor disputes enacted in New York.

Appellant Union (hereinafter referred to as "Union") was certified by the New York State Labor Relations Board in December, 1964 as collective bargaining representative of the maintenance department employees of the Appellee Long Island College Hospital (hereinafter referred to as "Hospital"). The Union sought to negotiate a collective bargaining agreement; the Hospital refused to negotiate with it, contending that it would not accept the Union as representative until its certification had been subjected to review in court, and approved by judicial authority. The Hospital also contended, *inter alia,* that section 716, in its provision for compulsory arbitration, violated the fourteenth amendment of the Constitution of the United States. Efforts of the New York State Mediation Board to effect an amicable resolution failed, and the Board certified its failure to settle the dispute. The Industrial Commissioner appointed a Fact-Finding Commission to inquire into the dispute. The Hospital challenged the jurisdiction of the Commission, claiming it had no dispute with its employees

within the meaning of section 716. The Hospital commenced the first captioned action for an injunction restraining the Industrial Commissioner and the Fact-Finding Commission from holding hearings or taking any other action.

The Hospital's assertions were the same as those made during the entire course of this matter; that it had no dispute with its employees as to which the Industrial Commissioner could act; that the only issue was the status of the Union as the representative of its employees, and, as to that issue, it was entitled to be charged by the Union with committing an unfair labor practice so that it could obtain a judicial review of the Union's certification. The Union and the State officials, joined as defendants, contended that no employer had a right to such judicial review of the certification of its employees' representative. New York law, as in the federal law, provides no direct judicial review of a union's certification. The only procedure for review is of a final order in an unfair labor practice proceeding.

The Supreme Court, New York County, in a decision unanimously affirmed by the Appellate Division, First Department, refused to grant the injunction. The Court adopted the Fact-Finding Commission's determination that it could not question the Union's certification, and further held that such certification is reviewable only if there is a final order in an unfair labor practice proceeding (Labor Law, §707). On cross-motions for summary judgment, the Supreme Court, in March 1967, found on the merits that the refusal of the Hospital to negotiate with the Union, for any reason, was a dispute within the meaning of section 716, and dismissed the complaint. The Appellate Division unanimously affirmed, without opinion (28 A. D. 2d 1092, 283 N. Y. S. 2d 1014) (1st Dep't, 1967).

During the course of the litigation, the Fact-Finding Commission held hearings, heard testimony, and issued a Report and Recommendations. The Commission had rejected the Hospital's assertion that no section 716 dispute existed by stating that section 716 was the statute's substitute for strike, and pointed to the fact that when a certified union strikes to compel an employer to deal with it, the decision to strike rather than file unfair labor practice charges precludes judicial review. It stated that a contrary result would leave collective bargaining in the hospitals vulnerable to intolerable delay. The Hospital refused to accept the Recommendations, and the Union advised the Industrial Commissioner that the dispute was still unresolved. On July 6, 1967 the Industrial Commissioner ordered compulsory arbitration, again pursuant to section 716. The Industrial Commissioner appointed the New York State Board of Mediation to serve, by three designated members of the Board, as arbitrator. The Hospital commenced the second above captioned proceeding to stay the arbitration.

The Supreme Court, in a decision affirmed by the Appellate Division, First Department, refused a stay of the arbitration ordered by the Industrial Commissioner. The decision of the Supreme Court was not reported.

Appeals from the orders dismissing the complaint in the Fact-Finding case, and denying a stay of arbitration, were consolidated by the Court of Appeals which rendered one decision. The Court of Appeals, in a 4-3 decision,* reversed the orders of the courts below, and declared that the Hospital's application for (1) a declaration that the Industrial Commissioner had no authority to appoint the

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* Upon original argument of the Appeals, Judge Keating did not participate. The Court divided 3-3, whereupon, the Court, on its own motion, directed reargument which resulted in the decision and order appealed from.

Fact-Finding Commission, and (2) an order staying the arbitration ordered by the Industrial Commissioner until the Union's certification had been judicially reviewed and found valid and enforceable, should be granted.

The majority opinion declared that a condition precedent to a union's resorting to section 716, that is, to the remedies of fact-finding or compulsory arbitration, is the affirmation of its majority status by filing refusal-to-bargain charges against the employer, permitting judicial review of its certification. The majority acknowledged that such procedures could cause substantial delay.

How the Federal Question Was Presented

This is a case of first impression. The statute in question, Labor Law, §§713 and 716, had never before been subjected to examination by the Court of Appeals. In both proceedings—that directed against the Fact-Finding Commission and that seeking to stay the arbitration ordered by the Industrial Commissioner—the Hospital contended that the statute violated the fourteenth amendment of the Constitution of the United States, arguing in part that a finding that its refusal to bargain was a dispute within the meaning of the Act would deprive the Hospital of its right to judicial review (R. Vol. I, pp. 94-96; R. Vol. II, p. 29).* The Hospital also argued that the provisions for arbitration established no standards, and violated the Constitution in that respect. The lower courts did not discuss these constitutional questions. The Court of Appeals discussed the constitutional arguments only in passing, stating in a footnote that a "serious question of due process might arise" if there were no provision for judicial review of the certification (A. p. 14, ftn. 3).

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* The Record includes the Record in the Court of Appeals in the "fact-finding case", index no. 13058/65 which is referred to here as R. Vol. I, and the Record in the "Arbitration case", index no. 12953/67 which is referred to here as R. Vol. II.

The dissenting opinion argued that the constitutional rights of hospital employees included the right to bargain collectively, which, in a different setting, included the essential concomitants of strike and picketing. It stated that a prompt submission of disputes to collective bargaining and compulsory arbitration was a *quid pro quo* for the legislative prohibition on strikes in nonprofit hospitals.

The precise federal questions sought to be reviewed on this appeal were not posed until after the decision of the Court of Appeals had been rendered. In creating a condition precedent to the availability of section 716 remedies, the Court of Appeals so altered the statute as to render it violative of the due process, equal protection, and free speech guarantees of the Constitution.

The decision of the Court of Appeals was wholly unexpected. All of the decisions of the courts below had been unanimous to the contrary. Nor was there anything in the statutory language or its legislative history permitting the Court's construction to be anticipated.

In fact, there is no statute, either federal or state, which parallels the requirement created by the Court: that of compulsory judicial review of a union's certification. The creation of such a condition is contrary to all decided law of New York State and of the federal courts. *Leedom v. Kyne,* 358 U. S. 184; *Wallachs* v. *Boland,* 277 N. Y. 345 (1938). Thus, the particular questions could not have been asserted prior to the decision of the Court of Appeals. A motion for reargument, or to amend the remittitur, was made to the Court (a copy is made part of the record). It stated that the court-created condition (1) deprived voluntary hospital workers of equal protection of the laws, (2) constituted an impermissible prohibition on First Amendment rights in indefinitely suspending rights to

picket or publicize grievances, and (3) violated the due process clause in imposing unreasonable restraints on the rights of hospital workers to select a representative for the purpose of collective bargaining, and upon the unions representing the workers.

The Court of Appeals summarily denied the motion for reargument, without opinion.

The Questions Presented Are Substantial

This case is of general importance. It represents a state's experiment with legislation designed to prevent interruption of services deemed essential to the public, whether such services are rendered by government employees or employees of non-governmental institutions. The need to balance government's legitimate interest in preventing such interruptions with the rights of the workers in their relationship with their employers is clear; what is unclear is the extent to which the rights of workers in such circumstances may be subordinated, delayed or obliterated.

The rights of workers to strike, picket or otherwise engage in concerted activity are generally held to be constitutionally protected rights. *Bailey* v. *Alabama*, 219 U. S. 219, 245; *American Federation of Labor* v. *American Sash and Door Co.*, 335 U. S. 538; *Senn* v. *Tile Layers Union*, 301 U. S. 468; *American Federation of Labor* v. *Swing*, 312 U. S. 321; *Bakery and Pastry Drivers* v. *Wohl*, 315 U. S. 769; *Cafeteria Employees Union* v. *Angelos*, 320 U. S. 293.

Those rights may be infringed only in very specific and narrow circumstances. *Giboney* v. *Empire Storage & Ice Co.*, 336 U. S. 490; *Meadowmoor Dairies, Inc.* v. *Milk Wagon Drivers Union*, 312 U. S. 287. If, for the purpose of this argument is it assumed that the State has the right to restrict workers in voluntary hospitals from the exercise

of these rights, under what conditions may the State prohibitions be enforced?

The test which seems to be developing is that of whether in prohibiting such activity a reasonable alternative is provided. Compulsory arbitration has been used as an alternative in disputes affecting public carriers subject to the Railway Labor Act, and prohibitions against strikes under that Act have been sustained by this Court since the compulsory arbitration provided was deemed "a reasonable alternative". *Railway Trainmen* v. *Chicago River and Indiana Railroad,* 353 U. S. 30, 41.

The section of the New York law here in issue is not entirely unique; Minnesota has had for many years statutory prohibition of strike by voluntary hospital employees providing for compulsory arbitration of their labor disputes. The Minnesota statute was upheld as constitutional by the highest court of that state which found that availability of adequate substitutes was a constitutional prerequisite to prohibiting strikes; *Fairview Hospital Assn.* v. *Public Building & Hospital Employees Union,* 241 Minn. 523, 64 N W 2d 16 (1954).

In the case at bar, assuming that prohibition against strike or picketing by this classification of workers is valid, the alternatives provided by the statute, as it has been construed by the Court of Appeals, are neither reasonable alternatives nor adequate substitutes.

1. Section 713 of the New York Labor Law as construed by the Court below constitutes an interference with rights guaranteed by the First Amendment.

Prior to July 1, 1963, section 713 of the Labor Law guaranteed non-interference with the rights of employees then covered by the law to strike or engage in other concerted activities. At the time that section 716 was enacted, section

713 was amended so as to make it unlawful for non-profit-making hospital employees to strike or to picket. That section, however, provides that hospital employees may truthfully advise the public that a grievance or dispute as defined in section 716 exisits at the hospital.

Prior to the enactment of sections 713 and 716, the law was clear that peaceful picketing was protected against State action by the Fourteenth Amendment. *Senn* v. *Tile Layers Union,* 301 U. S. 468; *Bakery and Pastry Drivers* v. *Wohl,* 315 U. S. 769; *American Federation of Labor* v. *Swing,* 312 U. S. 321; *Cafeteria Employees Union* v. *Angelos,* 320 U. S. 293. No exception was made from the constitutional guarantee for picketing of charitable institutions, including hospitals. *Prospect Heights Hospital, Inc.* v. *Davis,* 26 Misc. 2d 762, 201 N. Y. S. 2d 890 (1960); *Society of New York Hospital* v. *Hanson,* 185 Misc. 937, 59 N. Y. S. 2d 91, affd. 272 App. Div. 998, 73 N. Y. S. 2d 835 (1947); *Beth El Hospital* v. *Robbins,* 185 Misc. 506, 60 N. Y. S. 2d 798 (1946); *American Society for the Prevention of Cruelty to Animals* v. *Geiger,* 208 Misc. 29, 141 N. Y. S. 2d 610 (1955). However, the suspension of the right to picket, as with the right to strike, was at least arguably balanced by the Legislature's provision of a presumably immediately available alternative opportunity for expression of grievances. But cf. *Bakery & Pastry Drivers* v. *Wohl, supra.* There the New York State courts granted an injunction on the theory that a labor dispute did not exist within the meaning of the state anti-injunction law. This Court reversed, holding that the state could not abridge the right of free speech on its conception of what constituted a labor dispute within the state law.

The limitation on picketing by hospital workers was a departure from all prior law. The potential vice of the limitations in section 713 were anticipated by the members of

the Fact Finding Commission, Professor Michael Sovern, Hon. Orrin G. Judd (now U. S. District Judge for the Eastern District of New York), and Hon. Joseph Murphy. In their Interim Report, the Commission expressed concern for the conflict between the provisions of the new statute and the constitutional guarantees. The Commission said:

> "If a hospital's refusal to negotiate with a certified union does not give rise to a 'dispute' within the meaning of section 716, a serious problem arises under section 713's saving clause, which allows 'publicity, other than picketing, for the purpose of truthfully advising the public that a grievance or dispute, as defined in section seven hundred sixteen of this article, exists at such hospital . . .' The employer's view here, read in the light of section 713, would seem to mean that an employer's refusal to negotiate with a certified union may not be publicized. The constitutional difficulty posed by such an interpretation is obvious" (R. Vol. I, p. 58).

The Commission's concern has been realized in the Court's construction of section 716. A literal interpretation of the Court's decision would isolate hospital employees into a group required to stand mute for as long as it would take to follow the procedures which the Court has said are essential before they or their certified representative may speak on their behalf. Such a construction violates every tenet of the First and Fourteenth Amendments.

The statute, as it is now construed, not only discriminates against this class of workers so as to withhold from them the most basic rights of speech, assembly and peaceful protest, it also creates a *cordon sanitaire* around the voluntary hospital employer. Such an intent has uniformly been condemned, most recently in *Amalgamated Food Employees'*

Union (Local 590) v. *Logan Valley Plaza, Inc.*, 391 U. S. 308 where this Court said (at p. 325): "Neither precedent nor policy compels a result so at variance with the goal of free expression and communication that is the heart of the First Amendment." See also *United States* v. *Robel*, 389 U. S. 258, 266-268.

2. The Statute, in imposing the requirement of compulsory judicial review only upon unions representing voluntary hospital workers, violates rights guaranteed by the First and Fourteenth Amendments.

The lower Court's concern with due process requirements appears to have been unfortunately one-sided. The decision reflects concern only with the possibilty of a due process problem in the absence of judical review of the Union's certification. That concern was contrary to settled law: due process does not require that a decision made by an appropriate tribunal shall be reviewable by another. *Pittsburgh &c. Railway Co.* v. *Backus*, 154 U. S. 421, 426-427; *Reetz* v. *Michigan*, 188 U. S. 505, 508; *Dohany* v. *Rogers*, 281 U. S. 362, 369.

Due process does, however, require that legislation be reasonably calculated to obtain the desired objective. *Liggett Co.* v. *Baldridge*, 278 U. S. 105, discussed in 42 Harv. L. Rev. 435.

The avowed purpose of the statute here involved, to avoid labor unrest in voluntary hospitals, cannot even conjecturally be related to the requirement that only judicially certified unions be permitted to act as representatives of voluntary hospital workers.

The test of the reasonableness of the relationship between the evil to be curbed and the method adopted to achieve that purpose has been variously phrased. The clear consensus, however, is that where First Amendment rights are affected, only the most narrowly drawn limitations will be sustained.

Shelton v. *Tucker,* 364 U. S. 479; *United States* v. *Brown,* 381 U. S. 437, 461. It is now axiomatic that "[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms. *NAACP* v. *Button,* 371 U. S. 415, 438.

An instructive discussion of the constitutional requirements is found in *Thomas* v. *Collins,* 323 U. S. 516. In that case it was held that while a state, under its police power, might regulate labor unions with a view to protecting public interest, the exercise of such power is subject to the limitation that it does not violate rights guaranteed by the Constitution.

As this Court said (at page 531):

> "Where the line shall be placed in a particular application rests, not on such generalities, but on the concrete clash of particular interests and the community's relative evaluation both of them and of how the one will be affected by the specific restriction, the other by its absence. That judgment in the first instance is for the legislative body. But in our system where the line can constitutionally be placed presents a question this Court cannot escape answering independently, whatever the legislative judgment, in the light of our constitutional tradition. *Schneider* v. *State,* 308 U. S. 147, 161. And the answer, under that tradition, can be affirmative, to support an intrusion upon this domain, only if grave and impending public danger requires this."

See also *West Virginia School District* v. *Barnette,* 319 U. S. 624; *DeJonge* v. *Oregon,* 299 U. S. 353, 365; *Cantwell* v. *Connecticut,* 310 U. S. 296. The *DeJonge* case enunciated the important principle that in regulating constitutional rights, a State may only regulate the abuse, not the right itself. It was held there that "(t)he rights [of free speech and press] may be abused . . . [and] the peo-

ple through their legislatures may protect themselves against that abuse. But the legislative intervention can find constitutional justification only by dealing with the abuse. The rights themselves must not be curtailed'' (at pp. 364, 365).

3. Sections 713 and 716, as construed by the Court below, deprive workers in voluntary hospitals in New York of the equal protection of the laws guaranteed by the Fourteenth Amendment.

The Legislature, in enacting section 713, made unlawful strike and picketing by a specific group of workers—those employed by non-profitmaking hospitals. It did not attempt to place the same restraints upon hospital workers employed by profitmaking hospitals or upon other workers employed in providing essential services, although there is no reason to suppose that strikes or picketing by such workers is of less concern or hazard to the public. In isolating a segment of the hospital workers in the State, as the Legislature created the statutory scheme, the question of equal protection of the laws did not arise. It did not for the simple reason that the Legislature balanced the deprivation imposed upon that group by granting alternate remedies under section 716 which were presumably immediately available.

The constitutional infirmity appeared, however, as a consequence of the Court's further isolation of the same group of employees by establishing a condition to their exercise of rights as workers which is not imposed upon other employees in the State, or, in fact, in the United States. The Court-created condition, both by itself, and in its indefinite suspension of the alternate remedies provided by section 716, has changed the statute into an unconstitutional invasion of rights guaranteed by the Fourteenth Amendment.

As a result of the decision of the Court, for the first time anywhere, a group of workers has had imposed upon them

the condition that they obtain court approval of their representative before they may, in concert, exercise their rights as workers (to organize, strike or picket, or to avail themselves of the alternatives to those measures). Since the non-profit hospital workers have been singled out for such invidious treatment, the question thus arises: Does the equal protection clause permit an official act which imposes *only* on workers in non-profit hospitals restrictions upon the right of self-organization more stringent than those applied to any other group of workers?

The answer to that question requires the acceptance of the essential fact: No law regulating labor relations, either federal or state, whether in private or public employment, requires that a union "representative" receive court sanction of its status as representative. The Court's determination that hospital workers in non-profit hospitals in New York State must receive such approval of their selection of representative is unique. That the Court's determination is contrary to all statutory and decisional law on the subject is not the issue here. The issue is whether by imposing such a restriction on the rights of this group of workers the Court has violated the fundamental principle of equality of application of the law.

It is recognized that "(t)he Fourteenth Amendment is not a pedagogical requirement of the impracticable. The equal protection of the laws does not mean that all occupations that are called by the same name must be treated in the same way." *Dominion Hotel* v. *Arizona*, 249 U. S. 265, 268. The classic formulization of the test is that the differentiation or singling out of a group, "must rest on a difference which is real, as distinguished from one which is seemingly specious, or fanciful, so that all actually similarly situated will be treated alike, that the object of the classification must be the accomplishment of a purpose or the promotion of a policy, which is within the permissible function of the state and that the difference must bear a re-

lation to the object of the legislation which is substantial, as distinguished from one which is speculative, remote or negligible." Brandeis, J. in *Quaker City Cab. Co.* v. *Pennsylvania,* 277 U. S. 389, 406, where he dissented on the merits.

The lack of reasonableness of the classification here is apparent not only from the lack of relationship to the declared purpose of the statute but also from the following:

(1) No other employees, and specifically workers in private hospitals in New York, have applied to them the rule of the Court in this case; hospital workers in government hospitals do not.*

Other employees whose services are deemed essential, and who are therefore prohibited from strike, do not have to submit to compulsory review of their union's certification. See e.g. Railway Labor Act, 45 U. S. C. §151, *et seq.;* and statutes providing for arbitration in public utilities.

(2) The Court's own estimate of a possible time lapse resulting from court review of certification was a conservative 2½ years (A. 18).

(3) Nowhere in our system of law is there any comparable procedure known; requiring one who asserts a right to charge another with the commission of wrongdoing (here, filing of unfair labor practice charges) in order to vindicate his constitutional rights.

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* Private hospital employees have been held subject to the State Labor Relations Act, and are not restrained from strikes nor required to obtain judicial approval of their union representatives. Recently, employees of private hospitals meeting certain monetary jurisdictional standards have come within the ambit of the National Labor Relations Act, which does not require either restraint on strike or compulsory judicial review of certifications. *Butte Medical Properties,* 168 NLRB No. 52 (1967). The Taylor Act which regulates labor relations in government hospitals in New York has no provision for judicial review of the certification of representatives of government employees, although the employer is compelled to bargain with their representative. Civil Service Law, §200 et seq. and particularly §§207, 208.

It is the Court which has created the burden without parallel anywhere in the labor law. Its decision must, therefore, meet the standards uniformly used to test legislation which applies only to a limited classification of persons. Certainly there is no question that a constitutional prohibition cannot be transgressed indirectly any more than it can be violated by direct enactment. What is controlling is not the words or form of a statute but its actual practical operation and effect. *Speiser* v. *Randall*, 357 U. S. 513, 526.

Conclusion

The statutory sections here involved represent an experiment with the prompt submission of disputes to collective bargaining and compulsory arbitration as a *quid pro quo* for legislative prohibtion of strikes by workers who provide services which are deemed essential to the public health and safety. The need to find a constitutional balance between the public interest and the rights of such workers is a paramount issue, not only in New York, but throughout the United States. Thus, the questions presented by this appeal are substantial and of urgent public importance.

Respectfully submitted,

STEPHEN C. VLADECK,
Attorney for Appellant,
165 West 46th Street,
New York, N. Y. 10036.

JUDITH P. VLADECK,
BERNARD YAKER,
VLADECK, ELIAS, FRANKLE,
VLADECK & LEWIS,
Of Counsel.

APPENDICES

Appendix A, Opinions and Final Judgments Appealed From

Order No. 575 of Court of Appeals

COURT OF APPEALS

State of New York, ss:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 14th day of October in the year of our Lord one thousand nine hundred and sixty-eight, before the Judges of said Court.

WITNESS,

THE HON. STANLEY H. FULD,
Chief Judge, Presiding.

RAYMOND J. CANNON, Clerk.

Remittitur October 14, 1968.

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1. No. 575. 67

THE LONG ISLAND COLLEGE HOSPITAL,
Appellant,

vs.

M. P. CATHERWOOD, as Industrial Commissioner of the State of New York, & ors., &c.,
Respondents.

BE IT REMEMBERED, That on the 24th day of November in the year of our Lord one thousand nine hundred and

sixty-seven, The Long Island College Hospital, the appellant- in this cause, came here unto the Court of Appeals, by Kelley, Drye, Newhall, Maginnes & Warren, its attorneys, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the First Judicial Department. And M. P. Catherwood, as Industrial Commissioner of the State of New York, & ors., &c., the respondents in said cause, afterwards appeared in said Court of Appeals by Louis J. Lefkowitz, Attorney General, & ors., their attorneys.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Frederick T. Shea, of counsel for the appellant, and by Judith P. Vladeck, of counsel for the respondent Local 144, and by Mr. Mortimer Sattler, of counsel for the respondents State Officials and Commission, briefs filed by amici curiae, and reargued by counsel as above except Maria L. Marcus, of counsel for the respondents State Officials and Commission, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is reversed, without costs, and the matter remitted to Special Term for further proceedings in accordance with the opinion herein.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

THEREFORE, it is considered that the said order be reversed, without costs, &c., as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

RAYMOND J. CANNON
Clerk of the Court of Appeals
of the State of New York

Court of Appeals, Clerk's Office,
Albany, October 14, 1968.

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

RAYMOND J. CANNON
Clerk

(Emblem)

Appendix A

Order No. 102 of Court of Appeals

COURT OF APPEALS

State of New York, ss:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 14th day of October in the year of our Lord one thousand nine hundred and sixty-eight, before the Judges of said Court.

Witness,

THE HON. STANLEY H. FULD,
Chief Judge, Presiding.

RAYMOND J. CANNON, Clerk.

Remittitur October 14, 1968.

1. No. 102. 58

In the Matter of
THE LONG ISLAND COLLEGE HOSPITAL,
Appellant,

vs.

M. P. CATHERWOOD, as Industrial Commissioner of the State of New York, & ors., &c.,
Respondents.

BE IT REMEMBERED, That on the 9th day of March in the year of our Lord one thousand nine hundred and sixty-eight, The Long Island College Hospital, the appellant in this cause, came here unto the Court of Appeals, by

Kelley, Drye, Newhall, Maginnes & Warren, its attorneys, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the First Judicial Department. And M. P. Catherwood, as Industrial Commissioner of the State of New York, & ors., &c., the respondents in said cause, afterwards appeared in said Court of Appeals by Louis J. Lefkowitz, Attorney General, & ors., their attorneys.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Frederick T. Shea, of counsel for the appellant, and by Judith P. Vladeck, of counsel for the respondent Local 144, and by Mr. Mortimer Sattler, of counsel for the respondents State Officials and Commission, briefs filed by amici curiae, and reargued by counsel as above except Maria L. Marcus, of counsel for the respondents State Officials and Commission, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is reversed, without costs, and the matter remitted to Special Term for further proceedings in accordance with the opinion herein.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

THEREFORE, it is considered that the said order be reversed, without costs, &c., as aforesaid.

Appendix A

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

RAYMOND J. CANNON
Clerk of the Court of Appeals
of the State of New York

Court of Appeals, Clerk's Office,
Albany, October 14, 1968.

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

RAYMOND J. CANNON
Clerk.

(Emblem)

Appendix A

Opinion of Court of Appeals *

STATE OF NEW YORK

COURT OF APPEALS

1. No. 575 575

THE LONG ISLAND COLLEGE HOSPITAL,

Appellant,

vs.

M. P. CATHERWOOD, as Industrial Commissioner of the State of New York, & ors. &c.,

Respondents.

1. No. 102 68

In the Matter of

THE LONG ISLAND COLLEGE HOSPITAL,

Appellant,

against

M. P. CATHERWOOD, as Industrial Commissioner of the State of New York, & ors., &c.,

Respondents.

In each case:

Order reversed, without costs, and the matter remitted to Special Term for further proceedings in accordance with the opinion herein. Opinion by Fuld, Ch. J., in which

* Opinion unrevised and uncorrected. Not for publication.

Scileppi, Jasen and Gibson, JJ., concur. Burke, J., dissents and votes to affirm in an opinion in which Bergan and Breitel, JJ., concur.

FULD, Ch. J.:

The basic question presented in these cases—one of first impression—is this: Where a nonprofitmaking hospital challenges the representation status of a union, does section 716 of the New York State Labor Law, enacted in 1963, empower the New York State Industrial Commissioner to appoint a fact-finding commission to make recommendations for the settlement of the dispute and, if its recommendations are rejected, to submit the issues to compulsory arbitration before the New York State Board of Mediation? The Appellate Division held that the Industrial Commissioner had such power. We disagree; the orders appealed from must be reversed.

A proper understanding of the matters in issue calls for a brief review of the legislative history of section 716 and cognate sections of the Labor Law.

Prior to July 1963, state and local governments were greatly concerned with repeated strikes, picket lines and violence in nonprofitmaking hospitals, which interrupted essential services by hospital employees, and which resulted in the issuance of a number of injunctions against strikes. (See *Jewish Hospital of Brooklyn* v. *"John Doe,"* 252 App. Div. 581; *Society of New York Hospital* v. *Hanson,* 185 Misc. 937, affd. 272 App. Div. 998; *Beth-El Hospital* v. *Robbins,* 186 Misc. 506; *Mount Sinai Hospital, Inc.* v. *Davis,* 17 Misc 2d 727.)

The Legislature, in considering the enactment of a remedial statute, was confronted with the provisions of

the New York State Labor Relations Act which deprived unions, not recognized by a nonprofitmaking hospital, of the right to be certified as the exclusive representative of the employees it represented. Further, the Legislature well knew that, although the courts had enjoined hospital employees from striking and that it was in the public interest to continue the prohibition against such strikes, it would have been unjust to deprive hospital employees of their most potent economic weapon without granting them adequate means of securing relief against substandard wages and working conditions.

In an attempt to resolve these problems, the Legislature, in 1963, amended the Labor Law. There were three vital amendments.

First, strikes by employees of nonprofitmaking hospitals or residential care centers and lockouts by the employer were made unlawful (Labor Law, §713).

Second, the provisions of the State Labor Relations Act were extended to those institutions (Labor Law, §715). By enabling unions of hospital employees to invoke the procedures of the State Labor Relations Board, such unions, without striking, could become certified as the exclusive representatives of such employees (Labor Law, §705). A union of hospital employees could thus petition the Board for certification as exclusive representative of an appropriate unit of hospital employees. If the hospital refused to recognize a duly certified union, the union could obtain from the Board and, if necessary, from the court an order directing the hospital to bargain with the union (Labor Law, §§704[6], 705, 706, 707[1]). Under well established principles, the only way in which an employer, whether industrial or a hospital, could obtain court

review of the validity of a Board certification was by refusing to bargain with the union and then challenging the Board's subsequent order stamping such refusal an unfair labor practice. (See *Wallach's, Inc.* v. *Boland,* 277 N. Y. 345.)

Third, under section 716 (a new section), mediation, fact-finding and binding arbitration were established for the resolution of "disputes" between a nonprofitmaking hospital or residential care center and a union. The Industrial Commissioner or the New York State Board of Mediation was empowered to submit "disputes" as defined by that section to a fact-finding commission and, if the findings were rejected, to binding arbitration. Section 716, far from encompassing all disputes, covered only those which were limited to economic and union security issues; this is the way in which section 716(1) reads:

> "As used in this section 'grievance' means any controversy or claim arising out of or relating to the interpretation, application or breach of the provisions of an existing collective bargaining contract. As used in this section 'dispute' means all other controversies, claims or disputes between the employees of a non-profitmaking hospital or residential care center concerning wages, hours, union security, seniority or other economic matters, including but not limited to, controversies, claims or disputes arising in the course of negotiating, fixing, maintaining, changing or arranging such terms or conditions."

Thus, under the 1963 amendments the Labor Board's traditional jurisdiction to determine representation ques-

tions—subject to court review under section 707—was for the first time extended in favor of nonprofitmaking hospitals and residential care centers, and all other disputes (primarily economic issues) were to be determined through mediation, fact-finding and compulsory arbitration. The new amendments consequently meshed into the existing system controversies between voluntary hospitals and unions, leaving representation issues to the Labor Board subject to court review under section 707, and economic issues to mediation, fact-finding and compulsory arbitration.

With this legislative background, we turn now to the events and proceedings in these cases. The Labor Board certified Local 144 as the bargaining representative of maintenance employees. The hospital thereafter refused to bargain collectively with it on the ground that it did not represent the employees as it claimed. The union chose not to follow the traditional procedure by filing an unfair labor practice charge under section 704(6) against the hospital for refusal "to bargain collectively with representatives of the employees"—a procedure which, as I have already pointed out, would have enabled the hospital judicially to challenge the finding of an unfair labor practice as well as the Labor Board's certification of the union as exclusive bargaining representative for maintenance employees. (See *Wallach's, Inc.* v. *Boland*, 277 N. Y. 345, *supra; NLRB* v. *Metropolitan Life Insurance Co.*, 380 U. S. 438, 439.) Instead, it invoked the provisions of section 716(4) for the resolution of the controversy. The Industrial Commissioner appointed a three-man fact-finding commission and, when its recommendations were rejected by the hospital, the Commissioner sent the controversy to compulsory arbitration before the New York State

Board of Mediation. The hospital brought the present actions in which it is essentially seeking to enjoin the fact-finding commission from functioning and to stay the compulsory arbitration proceeding.

As already indicated, we are called upon to decide whether an issue as to representation is a "dispute" under section 716(1). If it is not, then, the Industrial Commissioner lacked the authority to appoint the fact-finding commission and to send the issue to compulsory arbitration. The legislative history, the language of the amendments and underlying policy considerations lead us to conclude that representation issues are not embraced in the word "dispute" as defined by that section.

The manifest reason for the exclusion of representation issues from that definition was that the same legislative body, which provided, in section 716, that economic issues were to be resolved by mediation, fact-finding and binding arbitration, also amended section 715 so that representation issues would be, in the case of nonprofitmaking hospitals—as they had been in the case of industrial and commercial establishments determined by the Labor Board (§705). Since representation disputes were to be resolved by the Labor Board, there was no reason for the Legislature to create a second set of procedures and a second tribunal to resolve the same issue, especially since questions as to representation, including any issue as to the appropriate bargaining unit, particularly call for the expert judgment of the Labor Board. As we wrote in *Matter of Levinsohn Corp.* (299 N. Y. 454), in speaking of the powers of the National Labor Relations Board—which applies with equal force to the State Labor Board—to deal with representation issues (p. 466),

> "The Federal courts have uniformly recognized that because of the complexity and difficulty of the problem of designating the *appropriate unit*, the power to make the decision has been delegated exclusively to the expert judgment of the law board which has wide discretion in making the determination."

The words, "concerning the association or representation of persons," are contained in the definition of "labor dispute" as set forth in section 701(8), a section which has been in effect for many years prior to 1963 and which, although inapplicable to the present cases, does furnish the background for viewing the definition of "dispute" in section 716(1). If the design of the legislature was to make section 716 applicable to representation issues, it would have been a simple matter to have included those words in the definition of section 716(1), as they are in section 701(8).[1]

That those words were intentionally omitted from section 716(1) is also apparent from the fact that the Legislature rejected the Savarese bill—the forerunner to section 716—which called for mediation and compulsory arbitration of "labor disputes" between nonprofitmaking hospitals and representatives of their employees but defined "labor disputes" as including controversies "con-

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[1] Section 701(8) in relevant part provides:

> "The term 'labor dispute' includes, but is not restricted to, any controversy between employers and employees or their representatives as defined in this section concerning the terms, tenure or conditions of employment or *concerning the association or representation* of persons in negotiating, fixing, maintaining, changing, or seeking to negotiate, fix, maintain or change terms or conditions of employment." (Emphasis supplied.)

cerning the association or representation of persons." (Joint Committee Report, Legislative Document [1963] No. 38, pp. 76-78.)

The traditional method of obtaining a court review of a Board certification by challenging the Board's unfair labor practice order (see, *supra,* p. 3), still applies to industrial and commercial enterprises (Labor Law, §707), and there is nothing in reason, or in the language of sections 715 [2] and 716 which even remotely suggests that nonprofitmaking hospitals to which section 707 now applies do not have the same right of judicial review [3] of a Board certification that employers generally possess under that section (§707) or that a different procedure of judicial review was intended to apply to nonprofitmaking hospitals. A decision that the validity of the Board's certification

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[2] In 1963, this section (§715) extended the provisions of article 20 of the Labor Law to nonprofitmaking hospitals. One of the sections of that article thus made applicable to these hospitals was section 707 which gives aggrieved persons the right of judicial review of final Board orders and, pursuant to such provision, employers generally, as previously noted (*supra,* p. 3), may obtain a court review of a Board certification by challenging the Board's unfair labor practice order.

[3] It is today an established principle of jurisprudence that "judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." (*Abbott Laboratories* v. *Gardner,* 387 U. S. 136, 140; see 4 Davis, Administrative Law Treatise, §28.07, pp. 30-32.) Since, in the present case, certifications are (as we have already shown) subject to judicial review under section 707 by challenging the Board's unfair labor practice order, the presumption of reviewability of the certification clearly applies. In point of fact, in the absence of some procedure for the review of a final agency action, a serious question of due process might arise, for, as was recently observed, "there must be some type of effective judicial review of final, substantive agency action which seriously affects personal or property rights." (*Gardner* v. *Toilet Goods Assn.,* 387 U. S. 167, 177, *per* Fortas, J., concurring.)

cannot be tested in the court until time-consuming mediation, fact-finding and compulsory arbitration proceedings have been exhausted can only serve to delay the rendition of a prompt determination as to the representation issue, a delay which is not in the interest of the public, the voluntary hospitals or the unions, since unresolved representation issues may cause the very strife which the 1963 amendments were enacted to prevent.

There have been occasions when the Legislature has granted two administrative agencies concurrent jurisdiction to determine the same issue, but the wisdom of such a grant of power is highly questionable, involving as it may duplicative proceedings and delays in decision making. We should not, therfore, be astute to find the existence of concurrent jurisdiction unless no other reading of the statute is possible. Here, as we have shown, there is nothing in the statutory scheme to support a claim of concurrent jurisdiction; on the contrary, there is no overlapping between the jurisdiction of the Labor Board and the Industrial Commissioner, the Labor Board being given exclusive jurisdiction with respect to questions of representation and the Industrial Commissioner and State Mediation Board being granted powers confined to economic matters. Indeed, section 702(9) specifically provides, "Notwithstanding the provisions of any other law, neither the industrial commissioner nor any board or other agency of the department of labor shall in any way direct, review, modify or reverse any decision or finding of the board".

Concededly, section 716 may not be invoked by a group of employees or by a minority union to arbitrate disputes with a non profit making hospital. If the statute were to be so read, it would be possible, for instance, for five hospital employees—out of a total of 100 or more—to obtain medi-

ation, fact-finding and arbitration under section 716, even though those five speak for none but themselves; and this process could be repeated so long as any other minority group made similar collective bargaining demands upon the hospital.

Such a reading of the statute, which would augument the rights of minority groups, would go counter to the modern-day labor policy which, as we recently observed in *Phelan* v. *Theatrical Protective Union No. 1* (22 N. Y. 2d 34, 43 [concurring opinion]), "has been built on the premise that a majority labor organization is the most effective vehicle for obtaining improvements in wages, hours and working conditions. 'The policy therefore extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees.' *NLRB* v. *Allis-Chalmers Manufacturing Co.*, 388 U. S. 175, 180)".

We may not overlook the very significant fact that, if section 716 may be invoked by a minority union before there has been a determination as to the appropriate bargaining unit, then, the arbitration board in order to make a meaningful award respecting the collective bargaining demands of a minority group or union, would have to determine the appropriate unit to which wages, hours, union security, seniority and other economic matters should be made applicable. An award based upon such a union determination would raise serious questions of due process since it would be rendered in a bilateral arbitration proceeding without having given other essential and necessary parties (other employees and other unions) having a vital interest in the award an opportunity to be heard. What is more, the unit determination in a section 716

arbitration proceeding would be made not by the Labor Board, which we have repeatedly come to recognize has special competence to deal with union problems (*Matter of Levinsohn Corp.*, 299 N. Y. 454, *supra*), but by an *ad hoc* arbitration panel not necessarily possessing the expertise to pass on frequently complicated and perplexing unit questions.

Furthermore, since collective bargaining includes the handling of grievances and arbitration proceedings, it would be—as the courts have held—an unfair labor practice for the employer to arbitrate with a minority union since the very process of arbitrating with a minority union is a violation of the majority union's rights. (See, e. g., *McGuire* v. *Humble Oil and Refining*, 355 F. 2d 352, cert. den. 384 U. S. 988.) An interpretation of the statute which would thus destroy the exclusive bargaining rights of a majority union, and which would mean that the Legislature in 1963 simultaneously enacted two provisions, one of which, section 715 (see, also, section 706), made it an unfair labor practice for a nonprofitmaking hospital to arbitrate with a minority union, and the other, section 716, would require the hospital by virtue of the compulsion of the statute to arbitrate with a minority union and thus commit an unfair labor practice, defies common sense.

To avoid the chaos which would result from such an interpretation of section 716, and to give majority unions the complete bundle of exclusive rights which they acquired by the statutory changes made in 1963, section 715 must be read as granting exclusive collective bargaining rights to a majority union—including the exclusive right to participate in arbitration proceedings under section 716—and section 716 as meaning that it may be invoked only by a union representing a majority of the employees in an appropriate bargaining unit. In short, a condition pre-

cedent to a union's resorting to the provision of section 716 is the establishment by it of its exclusive representation status under sections 705 and 707.[4]

Most regrettable and unfortunate is the delay that the union claims has prevented the parties from commencing negotiations and from agreeing to the terms of a collective bargaining agreement. However, to be faulted in this case is not the Labor Act but the union which did not follow judicially accepted methods for testing the validity of a Board certification by filing a refusal—to—bargain charge under section 706. Had the union observed the traditional method of testing a Board certification, the long delay[5] involved in resolving the current issue as to whether section 716 can be invoked in the case where the employing hospital challenges the representation status of the union would not have occurred.[6]

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[4] In this connection, it should be noted that the Appellate Division, on one of the early appeals in these very cases (*Long Island College Hospital* v. *Catherwood*, 26 A D 2d 543) also reached the conclusion that the term "dispute" in section 716(1) does not include a representation issue, declaring that

> "The disputes provision of section 716 of the Labor Law is not sufficiently broad to include a dispute over the right to exclusive representation by a union, the propriety of a bargaining unit, or any other issues raised as to the correctness of certification of an exclusive bargaining agent."

[5] Three years and ten months have elapsed since the union was certified by the Board.

[6] Unfortunately, delays are likely to occur whenever parties resort to the courts for a final adjudication of their disputes. Thus, in *Labor Board* v. *Metropolitan Ins. Co.* (380 U. S. 438), where the question as to the validity of a Board certification was reviewed by the courts as part of a challenge to a Board's order sustaining a refusal to bargain charge, the time which elapsed from the date of the Board certification to the date of the Supreme Court's determination as to the validity of the certification was 2½ years. (See, also, *Metropolitan Life Ins. Co.*, 156 N.L.R.B. 1408.)

Appendix A

For the reasons stated, the orders appealed from should be reversed and the appellant's application (1) for a declaration that the Industrial Commissioner had no authority to make his order of June 30, 1965, appointing the fact-finding commission, and (2) for an order permanently staying the arbitration ordered by the Industrial Commissioner until the respondent union's certification has been judicially reviewed and found valid and enforceable, should be granted.

BURKE, J. (Dissenting):

The New York State Labor Relations Act was enacted in 1937, in recognition of "the economic necessity for employees to possess full freedom of association, actual liberty of contract and bargaining power equal to that of their employers, who are frequently organized in corporate or other forms of association . . ." (Labor Law, §700) Indeed, our Court quickly recognized the Act as a legislative enactment intended to provide a procedure for the disposal of labor controversies which, when adopted and availed of by the parties to controversies, should terminate disputes. (See *Florsheim Shoe Store Co.* v. *Retail Shoe Salesmen's Union of Brooklyn and Queens, Local 287*, 288 N. Y. 188, 198; *United Baking Co.* v. *Bakery & Confectionery Workers' Union*, 257 App. Div. 501, 504). The Act created the State Labor Relations Board (§702), gave recognition to the rights of employees (§703), and then noted specific instances wherein the conduct of the employer would constitute an "unfair labor practice". (§704) A subdivision of that section made it an "unfair labor practice" for an employer to refuse to bargain collectively with the certified representatives of his employees. (§704(6)). While most of the subsequent sections of the Act merely pertain to the various procedural aspects for its implemen-

tation, section 713, as originally enacted, provided that nothing in the Act "shall be construed so as to interfere with, impede or diminish in any way the right of employees to strike or engage in other lawful, concerted activities . . ."

As the majority opinion quite properly indicates, there were numerous strikes at nonprofitmaking hospitals in New York City during the summer of 1962. Public reaction to the disruptive effect of these strikes on the orderly conduct of hospitals' business forced Governor Rockefeller to intercede in these strikes and to agree to the creation of specific legislation to deal wtih nonprofitmaking hospitals, thereby putting an end to such strikes. In July, 1963, section 716 of the Labor Law was engrafted on the pre-existing Labor Relations Act to bring nonprofitmaking hospitals located in cities with a population in excess of one million people within its scope. In furtherance of this legislative act, two existing sections (Labor Law, §§713, 715) patently conflicting with section 716, were amended to eliminate apparent inconsistencies. (See Reilly, New York Nonprofit Hospitals and the Labor Relations Act: Pitfalls of Emergency Legislation, 17 Syr. L. Rev. 482).

In enacting this legislation, a particular effort had to be made to preserve the Constitutional rights of the hospital employees. Our State Constitution clearly and unequivocally guarantees the right of employees "to organize and to bargain collectively through representatives of their own choosing." (N. Y. Const. art. 1, §17) Moreover, the Supreme Court has often stated in a different setting, that the right to picket and to strike is an essential concomitant of the right to engage in collective bargaining. (See *Bus Employees* v. *Missouri*, 374 U. S. 74; *Bus Employees* v. *Wisconsin Board*, 370 U. S. 383.)

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Section 716 was thus intended to serve a dual purpose; it was to guarantee the continued care of patients in non-profitmaking hospitals, and, at the same time, to preserve the Constitutional right of employees to bargain collectively through duly elected representatives. To protect hospital patients, employees were forbidden to strike. To safeguard the employees' rights, section 716 created a prompt means for employee representatives to have review of all their "disputes" and "grievances." The statutory definitions of these terms, set forth in the majority opinion, are indeed broad in scope.

It is not necessary to reproduce the full text of section 716 at this time. Rather, it is sufficient to note that Local 144 was employing these provisions prior to the commencement of the present action. After receiving the support of the maintenance employees in an election, and following its certification by the State Labor Relations Board as the proper bargaining representative for these maintenance employees of Long Island College Hospital, Local 144 requested that hospital to bargain collectively with it. When this request was refused, the union invoked the provisions of subdivision 4 of section 716. The Industrial Commissioner appointed a three-man fact-finding commission, and when its recommendations were also rejected by Long Island College Hospital, the Industrial Commissioner sent the controversy to compulsory arbitration before the New York State Board of Mediation. The hospital brought the present actions, seeking in essence to enjoin the fact-finding commission from functioning in accordance with the legislative plan by requesting a stay in the compulsory arbitration proceeding.

The majority opinion is quite clear in expressing its understanding of the issue involved in this litigation.

They state: "The basic question presented in these cases . . . is this: *Where a non profitmaking hospital challenges the representation status of a union,* does section 716 of the New York State Labor Law, enacted in 1963, empower the New York State Industrial Commissioner to appoint a fact-finding commission to make recommendations for the settlement of the dispute, and, if its recommendations are rejected, to submit the issues to compulsory arbitration before the New York State Board of Mediation?" (p. 1) (Emphasis added) Since we conclude that the hospital has no right under section 716 to challenge the representative status of a certified union, we do not deem it necessary to view the case in that context.

It is well settled that this Court, when interpreting a statute, is obliged to read the language of the statute closely and to draw plain inferences from that statute's legislative history. Both the terms of section 716 and its legislative history clearly indicate that the legislature did not intend to permit the hospital to contest a certified union's representative status.

In enacting section 716, the Legislature considered and then rejected a bill which would have given the hospital the right to contest a union's representation. The Savarese bill—a forerunner to section 716—had provided for mediation and compulsory arbitration of "labor disputes" between nonprofitmaking hospitals and representatives of their employees. Under that proposal, the term "disputes" was given a much broader interpretation than that found in the final enactment, as it included controversies "concerning the association or representation of persons." (Joint Committee Report, Legislative Document [1963] No. 38, pp. 76-78) Had that provision been

adopted, the representation issue would thus have come at least before the arbiter and, had the Legislature so chosen, ultimately before the Supreme Court where all aspects of his decision could have been made reviewable.

The detailed provisions of the New York State Labor Relations Act pertaining to representation and elections, were first established in 1937. Without belaboring the point, it is sufficient to note that they are at least as comprehensive as those set forth in the Railway Labor Act, initially enacted in 1926. (44 Stat. 557, as amended, 45 U. S. C. §§151-188) The major objective of that Act, according to the United States Supreme Court, was "the avoidance of industrial strife, by conference between the authorized representatives of employer and employee." (*Virginian R. Co.* v. *System Federation No. 40,* 300 U. S. 515, 547) Section 152, Ninth of that Act sets forth a machinery for the selection of the representatives of employees. That section authorizes the National Mediation Board, upon request, to investigate disputes over representation; to "designate" those who are affected; to use a secret ballot or any other appropriate means of ascertaining the choice of the employees; to establish rules governing elections and to certify the representatives so chosen as the bargaining representatives of these employees in negotiations. In sum, there is an election, the results are examined and barring irregularities, the results are certified. It is noteworthy that our federal courts have consistently sustained the certification of the National Mediation Board under that Act and have held that such certification need not be subject to judicial review. (See, e.g., *Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express & Station Employees* v. *Association for the Benefit of Non-Contract Employees,* 380 U. S. 360;

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Switchmen's Union v. *National Mediation Board*, 320 U. S. 297; *United States* v. *Feaster*, 376 F. 2d 147; *Ruby* v. *American Airlines, Inc.*, 323 F. 2d 248) It is our contention that the Legislature, in enacting section 716 concluded that, in the interest of preserving the employees' Constitutional right to bargain collectively, the determination of a representative unit in nonprofitmaking hospitals should lie solely with the State Labor Relations Board. The propriety of such a decision cannot be challenged in the light of the Supreme Court decisions,[1] and in view of the Legislature's own choice to avoid review by rejecting the Savarese bill.

The majority's assumption that an employer must, at some point, be permitted to challenge the unit certified by the Board before being compelled to submit to compulsory arbitration under section 716, is predicated on the scheme of the 1937 Act. Under section 704(6) of the original Act, it was an unfair labor practice for an employer to refuse to bargain collectively with the proper representatives of its employees. The statutory sequence permitted the representative to bring an unfair labor practice charge against the employer before the labor relations board. (§706) During the pendency of that action, the employees were permitted to engage in strikes and "any

[1] The majority opinion expresses concern that a serious due process question exists in the absence of judicial review. Justice Fortas, in the same paragraph in *Gardner* v. *Toilet Goods Ass'n* (387 U. S. 167, 177) which they quote, is quick to concede that the Legislature is the proper body to determine the form in which the remedy of review shall be exercised. Indeed, he cites with approval the decision of that Court in the *Switchmen's Union* case, which held that the certification by the National Mediation Board of a representative bargaining unit under the Railway Labor Act was sufficient, and that such certification need not be the subject of judicial review. The Supreme Court has thus clearly indicated that there is no due process problem in this present situation.

other lawful, concerted activity." (§706(5)) If the board sustained the charge the employer could then obtain judicial review of the charge and at the same time, bring before the court the propriety of the certification. (§707) The employees could continue their "lawful activities" during this entire process. Significantly, the original Act did not provide for compulsory arbitration, had no provision specifically pertaining to nonprofitmaking hospitals, and declared that nothing in the entire article "shall be construed so as to interfere with, impede or diminsh in any way the right of employees to strike or engage in other lawful, concerted activities . . ." (§713) Finally, not even the original Act would compel a union to commence an unfair labor practice action. Nevertheless the majority has apparently seen fit to compel Local 144 to file an unfair labor practice charge as a condition precedent to compulsory arbitration under section 716. They state that "a condition precedent to a union's resorting to the provision of section 716 is the establishment by it of its exclusive representation status under sections 705 and 707." (pp. 9-10). Had this been the intent of the Legislature when enacting section 716, twenty-six years after the effective date of the Act, it is reasonable to assume that they would have made some reference to it. We merely note that no such reference was made.

Section 706, dealing with the prevention of unfair labor practices has permitted employees since 1937 to engage in strikes and other lawful, concerted activity while the unfair labor practice charge is investigated, and if it is sustained, while it is being reviewed by the Supreme Court. Thus, the employer has an avenue of review, and the employee is armed with effective weapons for penalizing dilatory tactics. This was in accord with the general policy of the entire act: "It is in the public interest that equality

of bargaining power be established and maintained." (§700) We emphasize that section 713 was amended in 1963 to prohibit employees of nonprofitmaking hospitals from employing those rights generally regarded as the concomitants of collective bargaining—specifically, strikes and lockouts. There is no longer an equality of bargaining power in an unfair labor practice charge for these employees. Moreover, since the employees are precluded from striking, an employer is less concerned with the results of any election since he knows that he must negotiate with someone. As we interpret section 716, a prompt submission of disputes to collective bargaining and compulsory arbitration was a *quid pro quo* for the legislative prohibition of strikes in nonprofit hospitals. Such an analysis, we submit, preserves the equality of bargaining power, considered essential to the entire Act.

The majority opinion twice intimates that its decision is necessary to prevent minority unions from invoking section 716 before there has been a determination as to an appropriate bargaining unit. (pp. 8, 9) The fact is that Local 144 has already been certified as the majority union for the maintenance employees at Long Island College Hospital, confirming the election returns. Thus, when the majority contends that it is an unfair labor practice for an employer to arbitrate with a minority union, they fail to note that Local 144's certification has established it as a majority union. *McGuire* v. *Humble Oil & Refining Co.* (355 F. 2d 352), relied upon by the majority, is totally inapplicable to the present situation. In that case, the court merely concluded that it would be an unfair labor practice for the employer to negotiate with a minority union *when another union had already been certified* as the proper representative unit. Accordingly, the Hobson's choice envisioned by the majority (p. 9) is illusory.

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Following the enactment of section 716, lawsuits have been filed involving Long Island College Hospital, Park Avenue Clinic Hospital in Rochester, St. Joseph's Hospital in Syracuse, Crouse-Irving Hospital in Syracuse (Reilly, New York Nonprofit Hospitals and the Labor Relations Act: The Pitfalls of Emergency Legislation, 17 Syr. L. Rev. 482, 483 n. 8) and Roosevelt Hospital in New York City. It is too early to ascertain what effect the decision reached by the Court in this case will have on these, and analogous cases. However, we note that in *Davis* v. *Roosevelt Hospital,* (N. Y. L. J., Sept. 30, 1968, p. 16, col. 1, 2) the parties have already concluded compulsory arbitration. However, since Roosevelt Hospital preserved its challenge against the union's certification, it is reasonable to presume that the results of that arbitration will be again delayed, pending this unnecessary review of the union's certification. As we said above, the representation issue should be finally resolved when the board issues a certification. As a result of the 1963 amendment to section 713, the employees in nonprofitmaking hospitals are at all times precluded from striking, thus reducing if not eliminating any interest an employer might have with reference to the particular union membership of his employees. Under such circumstances, and in light of the history of section 716, we conclude that an employer has no right to question the certification of a particular union.

We would affirm the orders of the Appellate Division.

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Opinion of Supreme Court, New York County

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Supreme Court, New York County
Mr. Justice Flynn

L. I. College Hospital v. Catherwood—Motion is disposed of in accordance with decision in accompanying memorandum opinion on companion motion in this action, published simultaneously herewith.

L. I. College Hospital v. Catherwood—The plaintiff's motion for summary judgment on the first cause of action and defendants' cross-motion for summary judgment are considered and are disposed of as follows:

It appears from the papers submitted on this motion that there is no dispute that the plaintiff operates a non-profit hospital, and after it had objected to the results of an election conducted by the defendant New York State Labor Relations Board said defendant certified that the defendant Local 144 be the bargaining representative for plaintiff's maintenance employees. The plaintiff refused to recognize the defendant Local 144 as the said bargaining representative and refused to negotiate with that union. The defendant Local 144 did not seek relief pursuant to section 705 of the Labor Law and alleges that a controversy exists concerning the representation of the maintenance workers. Instead, the said defendant union demanded relief pursuant to section 716 of the Labor Law, which provided for fact-finding by a board of inquiry and the submission of disputes to arbitration. The board of inquiry has convened and issued an interim report. No arbitration has been had herein.

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The plaintiff contends that by reason of the defendant's failure to seek a determination as to the validity of its certification as the bargaining representative, the plaintiff is denied judicial review of the certification and is compelled to arbitrate without being certain that Local 144 is the proper bargaining representative for its employees.

Under ordinary circumstances arbitration can only be had by the express agreement of the parties. In this case, section 716 of the Labor Law provides that where there is no agreement between a non-profit hospital and its employees, the agreement to arbitrate is implied, by law, and that the Supreme Court shall have jurisdiction thereof pursuant to the provisions of article 84 of the Civil Practice Act (now article 75, CPLR). It appears that if Local 144 is not the bargaining representative of the maintenance workers then no agreement to arbitrate can be implied pursuant to section 716 of the Labor Law; and this issue may be tested by procedures set forth in section 7503 and section 7511, CPLR.

In view of the fact that no arbitration proceedings has been instituted, the court will not pass upon the terms of certification at this time.

The maintenance of the buildings where the ill, disabled and infirm are housed and treated affects the health of the people of the State of New York (N. Y. Constitution, article 17, sec. 2), and the Legislature exercised a valid power in the enactment of section 716 of the Labor Law (Park Ave. Hospital v. Kramer, 48 Misc. 2d 826, modified on other grounds 26 A. D. 2d 612).

The refusal of the plaintiff to negotiate with the defendant Local 144, for whatever reason, is a dispute within the meaning of section 716(1) of the Labor Law, and the main-

tenance employees were entitled to the relief provided in that section.

The plaintiff contends that its connection with the operation of a medical school exempts it from the provisions of the statute. The providing of unimpaired medical facilities in non-profit hospitals without interruptions caused by strikes over wages, working hours, job security and other labor disputes were the concern of the Legislature in the enactment of section 716 of the Labor Law and the fact that the plaintiff has some relationship with a medical school can not render it immune from the provisions of that section. It would further appear that in order to maintain the standard of care required in the City of New York and attract internes and other personnel to work at the hospital the plaintiff must be affiliated with a medical school (see Loew v. City of N. Y., 43 Misc. 2d 1021, aff'd 22 A. D. 2d 762).

The plaintiff alleges that it is subject to the National Labor Relations Act. However, as a non-profit hospital, it is specifically excluded from that act (29 U. S. C., sec. 152[2]). In order to interpose this defense, under section 715 of the Labor Law, it first must be claimed by the defendant labor board that the maintenance employees are subject to the National Labor Relations Act and the plaintiff must "concede to" and "agree with" the defendant labor board as to federal jurisdiction. Here the defendant labor board does not assert that the employees are subject to the federal law, and the plaintiff cannot assert a claim that it is not subject to article 20 of the Labor Law.

Accordingly, the plaintiff's motion for summary judgment is denied and defendants' motion is granted to the extent of dismissing the complaint without prejudice to any rights plaintiff may have pursuant to article 75, CPLR. Settle judgment.

Appendix A

Opinion of the Appellate Division

Botein, P.J., Stevens, Eager, Capozzoli and McGivern, JJ.
12558N

In the Matter of

THE LONG ISLAND COLLEGE HOSPITAL,

Petitioner-Appellant,
E. T. D'Ablemont

against

M. P. CATHERWOOD, as Industrial Commissioner of the State of New York; VINCENT D. McDONNELL, THOMAS E. FITZGERALD, EDWARD A. O'HARA, ROBERT F. RISLEY, FRANCIS E. RIVERS, ERIC J. SCHMERTZ and JOSEPH SHISTER, as the Members of the NEW YORK STATE BOARD OF MEDIATION; PETER OTTLEY, as President, and PETER BYRNE, as Secretary-Treasurer of LOCAL 144, HOTEL & ALLIED SERVICE EMPLOYEES UNION, affiliated with BUILDING SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO; and JAY KRAMER, JAMES AMADEI and MARTIN GREENE, as the Members of the NEW YORK STATE LABOR RELATIONS BOARD,

Respondents-Respondents.
M. L. Marcus
J. P. Vladeck

Order and judgment herein appealed from, unanimously modified, on the law, to strike the second decretal paragraph thereof, and as so modified such order and judgment is otherwise affirmed, without costs or disbursements to either party.

Appendix A

In this proceeding, brought pursuant to CPLR Articles 75 and 78, petitioner contests the validity of the certification of Local 144 as the bargaining representative of its maintenance employees, and contends that its refusal to bargain with Local 144 in order to test the validity of such certification is not a dispute subject to arbitration under section 716 of the Labor Law. Petitioner seeks also to stay the arbitration directed by the respondent Industrial Commissioner. Special Term denied petitioner's application for a stay of arbitration and further ordered and adjudged that petitioner's refusal to negotiate was "impermissible under sections 705 and 707 of the Labor Law". It is such adjudication which is stricken from the order and judgment. This court has not so held nor does the statute so declare.

With respect to the denial of the application pursuant to CPLR Article 75 to stay arbitration, such determination is approved for the petition is insufficient on its face to entitle petitioner to any such relief. Under Labor Law, section 716, it is not requisite that there exist a valid agreement to arbitrate before any existing dispute between the parties can be referred to arbitration. In fact subdivision 4 thereof provides in the absence of a collective bargaining agreement between the employees of a non-profitmaking hospital, or their representatives, and such hospital, the New York State Board of Mediation and the Industrial Commissioner may exercise certain powers vested in them under subdivision three of section 716. Subdivision 3(b) empowers the Industrial Commissioner to submit the dispute to arbitration upon his own motion upon certification by the Board of Mediation that in its opinion efforts to effect a voluntary settlement of such dispute have been unsuccessful. In short, compulsory arbitration may be imposed upon the parties where disputes are found to exist. The relevant provisions of CPLR Article 75 with respect to stay of arbitration have no application under such con-

ditions and the absence of a valid agreement to arbitrate is neither fatal nor a deficiency. (See also, Labor Law §716(6) re: jurisdiction of the supreme court.) The area of disputes to be resolved is defined in section 716(1) and we cannot now conclude that matters will be determined which are not embraced in the applicable provision.

Special Term (Flynn, J.) earlier determined that petitioner's refusal to negotiate with the union was a dispute within the meaning of Labor Law, §716, and such determination was unanimously affirmed on appeal (28 A D 2d 1092).

In that phase of the proceeding pursuant to CPLR Article 78 which seeks to review and annul the Industrial Commissioner's determination that the dispute is subject to compulsory arbitration, and to enjoin the other respondents from taking further action in pursuance thereof, we conclude also that the allegations of the petition are insufficient to entitle petitioner to the relief sought.

Section 716, subdivision 6, of the Labor Law spells out the powers of the supreme court with respect to matters embraced within that section. In so doing it, in effect, limits such powers, particularly with respect to the time or stage of the proceeding at which such powers shall be exercised. In a prior appeal involving these parties (26 A D 2d 543) this court noted "the only avenue to judicial review as to certification is limited to a direct appeal from a final order *arising in enforcement proceedings* (Labor Law §707)" (emphasis supplied) (P. 543-544; *cf.* Matter of Wallach's Inc. *v.* Boland, 253 App. Div. 371, aff'd 277 N. Y. 345). It does not now appear that the matters directed to be submitted to arbitration are beyond the scope of section 716, nor can we now conclude that matters without the jurisdiction of the arbitrator will be entertained and resolved by it.

Order filed.

Appendix A

Opinion of Supreme Court, New York County

SUPREME COURT

NEW YORK COUNTY

SPECIAL TERM—PART I

[SAME TITLE]

DAVIDSON, J. *Memo.*

This is an application by petitioner, a non-profit hospital, to stay compulsory arbitration between petitioner and Local 144, ordered by the respondent Industrial Commissioner. The petitioner seeks to restrain the New York State Board of Mediation, which has been designated by the Industrial Commissioner as Arbitrator, from proceeding to arbitrate the dispute between the hospital and the Union. Petitioner has refused to recognize and bargain collectively with Local 144.

Petitioner contends 1. that it has a right to judicial review of Local 144's certification as the bargaining representative; and 2. that Labor Law, Sec. 117, is an unconstitutional delegation of legislative power to the Industrial Commissioner and the New York State Mediation Board.

On December 28, 1964 the New York State Labor Board certified Local 144 as bargaining representative of petitioner's maintenance employees (Labor Law, Sec. 705). A certification by the Labor Board as to the proper bargaining representative under Labor Law Sec. 705 may not be judicially reviewed (*Matter of Wallach's Inc.* v. *Boland*, 253 App. Div. 371; aff'd. 277 N. Y. 345).

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The Appellate Division of the First Department on an appeal involving the same parties in this proceeding ruled "the only avenue of judicial review as to certification is limited to a direct appeal from a final order arising in an enforcement proceeding (Labor Law, Sec. 707)." 26 A. D. 2d 543. Clearly this court may not disregard that decision but is duty bound to implement it. Petitioner's refusal to acknowledge Local 144 and begin collective bargaining with the Union was an impermissible flouting of the Appellate Court's mandate. Petitioner's claim to stay arbitration on that ground is denied.

Petitioner's claim that Labor Law Section 716 is unconstitutional because it improperly delegates power to the State Board of Mediation and the Industrial Commissioner without providing legislative standards to guide them in the exercise of those powers appears equally without merit. The Legislature recognized that the business of the nonprofit hospital was so affected with the public interest as to require continued and uninterrupted service to the public. It was for that reason that this legislation was enacted which prohibited the hospital employees from striking and which provided for compulsory collective bargaining, fact-finding and arbitration. The delegation of power to an administrative agency may be accomplished in general language, but the specific evil which the statute seeks to eliminate is a guidepost to direct and channel administrative discretion. The statute and its amendments were designed to avoid labor disputes in voluntary hospitals by coupling the extension of collective bargaining right with a prohibition against strikes. It seems clear that the law was intended to guarantee to workers in charitable hospitals all the rights available to other workers covered by the State Labor Relations Act, except the right to

strike or to picket and to provide the substitution of mediation, fact finding and binding arbitration for strikes. It would seem that the Industrial Commissioner has the experience which would justify reliance upon his expertise in determining which remedy is most likely to effect the statutory purpose in each particular case. Such expertise may be exercised only in the manner in which the statute permits.

The discretion thus vested in the Industrial Commissioner is not an improper delegation of legislative authority.

The Hospital Association of New York State Incorporated, a New York Membership Corporation of over 250 non-profit voluntary hospitals in New York State, has petitioned the court for permission to appear in these proceedings as Amicus Curiae. Such permission to intervene is granted.

It follows, therefore, that Petitioner's application to stay arbitration is in all respects denied. Settle order.

/s/ IRWIN D. DAVIDSON
J. S. C.

Dated: September 5, 1967

Appendix B, Statutes Involved

New York Labor Law, §§713, 716

§713. Limitations

Nothing in this article shall be construed so as to interfere with, impede or diminish in any way the right of employees to strike or engage in other lawful, concerted activities, except that it shall continue to be unlawful for the employees of a non-profitmaking hospital or residential care center, or their representatives, or any other persons to engage in or to induce or encourage, or to attempt to engage in or to induce or encourage any strike, work stoppage, slowdown or withholding of goods or services by such employees or other persons at such hospital or residential care center, provided, however, that nothing herein shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public that a grievance or dispute, as defined in section seven hundred sixteen of this article, exists at such hospital or residential care center, as long as such publicity does not have the effect of inducing any persons to withhold goods or services at such hospital or residential care center.

It shall be unlawful for a non-profitmaking hospital or residential care center to institute, declare or cause, or to attempt to institute, declare or cause any lockout of the employees of such hospital or residential care center. Added L.1937, c. 443, §1; amended L.1963, c. 515, §3, eff. July 1, 1963.

§716. Grievances and disputes in non-profitmaking hospitals and residential care centers

1. As used in this section "grievance" means any controversy or claim arising out of or relating to the inter-

pretation, application or breach of the provisions of an existing collective bargaining contract. As used in this section "dispute" means all other controversies, claims or disputes between the employees of a non-profitmaking hospital or residential care center, or their representatives, and such hospital or residential care center concerning wages, hours, union security, seniority or other economic matters, including, but not limited to, controversies, claims or disputes arising in the course of negotiating, fixing, maintaining, changing or arranging such terms or conditions.

2. Every collective bargaining contract between the employees of a non-profitmaking hospital or residential care center, or their representatives, and such hospital or residential care center which does not contain provisions for the final and binding determination of grievances shall be deemed to include provision for the submission of such grievances, upon the request of either or both parties, to arbitration pursuant to such rules as may be established from time to time by the New York state board of mediation.

3. Every collective bargaining contract between the employees of a non-profitmaking hospital or residential care center, or their representatives, and such hospital or residential care center which does not contain provisions for the final and binding determination of disputes shall be deemed to include provisions for:

(a) the appointment of a fact-finding commission by the New York state board of mediation upon the request of both parties to the dispute, or by the industrial commissioner upon his own motion and upon certification by such

board that in its opinion efforts to effect a voluntary settlement of the dispute have been unsuccessful. Such fact-finding commission shall have all of the powers and duties, including the power to make recommendations for the settlement of the dispute, as are vested in a board of inquiry by article twenty-two of this chapter; and

(b) the submission of the dispute to arbitration, pursuant to such rules as may be established from time to time by the New York state board of mediation, by such board of mediation upon the request of both parties to the dispute, or by the industrial commissioner upon his own motion and upon certification by such board of mediation that in its opinion efforts to effect a voluntary settlement of the dispute have been unsuccessful.

4. In the absence of a collective bargaining contract between the employees of a non-profitmaking hospital or residential care center, or their representatives, and such hospital or residential care center, the New York state board of mediation and the industrial commissioner may, in the manner and upon the conditions provided in subdivision three of this section, exercise all of the powers vested in them by the provisions of such subdivision of such section.

5. Nothing in this section shall be deemed to affect, impair or alter any collective bargaining contract between the employees of a non-profitmaking hospital or residential care center, or their representatives, and such hospital or residential care center which was executed prior to July first, nineteen hundred sixty-three, during the term of such contract.

Appendix B

6. The supreme court shall have jurisdiction, to confirm, modify, correct or vacate any arbitration award made pursuant to the procedure established by this section, in the manner provided by article eighty-four of the civil practice act. The supreme court shall have jurisdiction, upon such notice as it deems appropriate, to restrain or enjoin any violation of the provisions of this section or section seven hundred thirteen and to grant such other and further equitable relief as may be appropriate. The provisions of section eight hundred seventy-six-a of the civil practice act shall not apply to an action or proceeding instituted pursuant to this section or section seven hundred thirteen. Added L.1963, c. 515, §5, eff. July 1, 1963.



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1045

PETER OTTLEY, as President, and PETER BYRNE, as Secretary-Treasurer, of LOCAL 144, HOTEL & ALLIED SERVICE EMPLOYEES UNION, affiliated with BUILDING SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO,

against *Appellants,*

THE LONG ISLAND COLLEGE HOSPITAL,

Appellee.

PETER OTTLEY, as President, and PETER BYRNE, as Secretary-Treasurer, of LOCAL 144, HOTEL & ALLIED SERVICE EMPLOYEES UNION, affiliated with BUILDING SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO,

against *Appellants,*

THE LONG ISLAND COLLEGE HOSPITAL,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

BRIEF OF THE ATTORNEY GENERAL OF THE STATE OF NEW YORK AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT UNION'S JURISDICTIONAL STATEMENT

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
as *Amicus Curiae*

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

MARIA L. MARCUS
AMY JUVILER
Assistant Attorneys General,
of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. .....

PETER OTTLEY, as President, and PETER BYRNE, as Secretary-Treasurer, of LOCAL 144, HOTEL & ALLIED SERVICE EMPLOYEES UNION, affiliated with BUILDING SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO,

Appellants,

against

THE LONG ISLAND COLLEGE HOSPITAL,

Appellee.

PETER OTTLEY, as President, and PETER BYRNE, as Secretary-Treasurer, of LOCAL 144, HOTEL & ALLIED SERVICE EMPLOYEES UNION, affiliated with BUILDING SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO,

Appellants,

against

THE LONG ISLAND COLLEGE HOSPITAL,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF OF THE ATTORNEY GENERAL OF THE STATE OF NEW YORK AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT UNION'S JURISDICTIONAL STATEMENT

Interest of *Amicus*

Section 716 of the Labor Law of New York represents the first attempt by New York State to utilize compulsory arbitration as a method of settling industrial disputes

where collective bargaining has failed. This statute has never before been interpreted by the New York Court of Appeals.

Throughout the proceedings below, appellee Long Island College Hospital argued that the compulsory arbitration provisions of § 716 deprived it of due process and equal protection under the Fourteenth Amendment of the Constitution. It was appellee's contention that the statute established insufficient guidelines for the authority delegated to the arbitrators, and that appellee must have judicial review of the certification of appellant Local 144, Hotel and Allied Service Employees Union.

In order to avoid "a serious question of due process" (Appellant's Appendix, p. A14, footnote 3), the New York Court of Appeals applied the statute so as to require judicial review of the certification.

Employees of non-profit hospitals may now neither strike nor bargain collectively. Their First Amendment rights may be suspended indefinitely in New York State while a procedure acknowledged by the decision below as of several years duration, is followed. When this procedure is completed, hearings relating to arbitration must first commence and this arbitration in turn is subject to limited judicial review. Thus, many years must elapse between election of a representative and the consummation of a collective bargaining contract.

As the chief legal officer of the State (N. Y. Executive Law § 63), charged with the defense of the enactments of our State Legislature (Executive Law § 71), the Attorney General is concerned with preserving the effectiveness and the constitutionality of state legislation. Since the application of this statute may make the legislation unworkable, employees will be hesitant to resort to it as a solution to an employer's intransigence. Thus, the decision below again places the State in the position of facing unlawful strikes rather than utilizing orderly procedures which maintain equality of bargaining power between the parties.

ARGUMENT

1. This appeal presents questions of great public importance because the application of the statute at issue by the New York Court of Appeals has undercut the State's attempt to resolve industrial disputes through compulsory arbitration.

This Court has approved compulsory arbitration as a means of avoiding strikes which may have disastrous consequences. In *Brotherhood of Railway Trainmen* v. *Chicago, and Indiana River Railroad,* 353 U. S. 30, 41 1957), it was held that strikes over disputes subject to compulsory arbitration under the Railway Labor Act may be enjoined, since:

> "Such controversies . . . are not the same as those in which the injunction strips labor of its primary weapon without substituting any reasonable alternative."

Section 716 of the Labor Law represents New York State's attempt to arrive at a "reasonable alternative" for nonprofit hospital workers who are prohibited from striking solely because their services are indispensable to the community. Prior to 1963, these employees were compelled to accept substandard wages and working conditions because employers had no legal duty to recognize or bargain with them.

Commenting on the hardship imposed on this group of workers by the issuance of injunctions, the Court in *Prospect Heights Hospital* v. *Davis,* 22 Misc. 2d 511, 515-516 (Sup. Ct. Kings Co., 1959), stated:

> "It is inconceivable that employees of charitable corporations, denied the benefits of the fair labor practice machinery set up in the State Labor Relations Act, barred, at least in this Department, from enjoy-

ing the safeguards against the injunctive mandates under § 876-a of the Civil Practice Act, unprotected by civil service laws, must be doubly relegated to an inferior status, that is forbidden their only economic weapon, the right to strike, and then forced to wander about in an industrial no man's land, helpless to organize, assemble, or publicize their grievances, as guaranteed to them by the federal and state constitutions."

After a series of strikes against non-profit hospitals in 1959 and 1962, it became apparent that new legislation was needed. In order to encourage voluntary settlement as well as to provide a means of finally resolving impasses, the New York State Legislature provided that all collective bargaining contracts which did not contain provisions for arbitration of disputes were deemed to provide for the appointment of a Fact-Finding Commission or invocation of arbitration, by order of the New York State Industrial Commissioner, after failure of the New York State Mediation Board to settle the dispute. Where no collective bargaining contract exists, the Mediation Board and the Industrial Commissioner could exercise the same powers as to mediation and arbitration.

This classic pattern of bargaining, mediation, fact-finding and—if all else fails—binding arbitration follows that of the Minnesota statute (Minn. Stat. Ann. §§ 179.35-179.30) prohibiting strikes by employees of charitable hospitals and concomitantly providing for compulsory arbitration of their labor disputes. Its constitutionality was upheld in *Fairview Hospital Assocation* v. *Public Building and Hospital Employees Union,* 241 Minn. 523, 64 N. W. 2d 16 (1954). The court found that the substitution of a reasonable alternative was a constitutional prerequisite to prohibiting strikes.

New York is one of several states which has chosen to rely upon compulsory arbitration in order to resolve in-

dustrial disputes involving employees in the private sector. See Pennsylvania, Purdon's Statutes Annotated, Title 43, Secs. 213.1-213.16; Florida Statutes, § 453.01 et seq.; Indiana, Burns' Stat. Ann., § 40.241 et seq.; Kansas, Gen. Statutes 44-603—44-609; Massachusetts, Ann. Laws of Mass., C 150 B; New Jersey, Revised Statutes, § 34:B-20, L. 1947, ch. 75.

Nor are employees of hospitals and public utilities the only kinds of workers whose right to strike has been abrogated and replaced by provisions mandating binding arbitration. Several categories of State employees in various jurisdictions are subject to such statutes. General Laws of Rhode Island §28-9.3 et seq., § 28-9.3-9, § 28-9.1; Pennsylvania, Purdon's Statutes Annotated, Title 43 §§ 217.1-217.10; Wyoming Statutes 1957 § 27-270; Louisiana Stat.. Ann. Revised Stat. § 23:890 (E) (1967 Supp.).

The decision below gave token recognition to the necessity for the formulation decided upon by the Legislature:

> ". . . [T]he Legislature well knew that, although the courts had enjoined hospital employees from striking and that it was in the public interest to continue the prohibition against such strikes, it would have been unjust to deprive hospital employees of their most potent weapon without granting them adequate means of securing relief against substandard wages and working conditions." (Appellants' Appendix, p. A9)

However, the Court went on to apply the New York statute so as to mandate a procedure acknowledged by the decision itself to be of several years duration, as a condition precedent to the commencement of arbitration. After the arbitration is complete, the courts must review it. Thus, many years would elapse between the election of a bargaining agent and the achievement of a collective bargaining contract.

The error inherent in the court's application and its conception of due process will be discussed at point 2 *infra*. The effect of this error is to create such protracted delays in the implementation of the legislative scheme that the statute becomes unworkable. Foreclosure of this lawful and orderly avenue of redress for hospital employees would place the State in the position of continuing to face illegal strikes.

The alternative approach to the prevention of strikes has been the imposition of fines and prison sentences. This method has been judicially accepted in New York, but has frequently been unsuccessful in its goal. See, e.g., *City of New York* v. *John J. DeLury*, 23 N. Y. 2d 175 (1968); *Board of Education* v. *Shanker*, 54 Misc. 2d 941 (Sup. Ct. N. Y. Co., 1967), aff'd 29 App. Div. 2d 634 (1st Dept. 1968).

The case at bar not only undercuts New York State's attempt to regulate labor regulations through binding recommendations by an independent third party, but also constitutes persuasive authority for courts of other states called upon to consider the validity of such statutes. It is a case of first impression in this judicial area, and its due process holding has broad implications with respect to the summary remedy of arbitration. State legislatures, as well, will be hesitant to institute this regulatory scheme if the New York Court of Appeals' holding is allowed to stand.

2. The decision below jeopardizes rights under the First Amendment of the United States Constitution.

This Court has recognized the right to organize and select representatives for lawful purposes of collective bargaining as "fundamental" and antedating the protections given by the National Labor Relations Act, 29 U.S.C. § 141 et seq.; *Auto Workers* v. *Wisconsin Board*, 336 U. S. 245, 259 (1948); *Labor Board* v. *Jones and Laughlin*, 301 U. S. 1, 33 (1936).

The right to strike has been characterized as "more vulnerable to regulation than the right to organize . . ." *Auto Workers* v. *Wisconsin Board, supra,* 336 U. S. at 259. However, this Court has consistently declared that federal policy favors protection of peaceful strikes for higher wages. As this Court said in *Labor Board* v. *Erie Resistor Corp.,* 373 U. S. 221, 233-234 (1962):

> "This repeated solicitude for the right to strike is predicated upon the conclusion that a strike when legitimately employed is an economic weapon which in great measure implements and supports the principles of the collective bargaining system.
>
> While Congress has from time to time revamped and redirected national labor policy, its concern for the integrity for the strike weapon has remained constant."

This Court has also made clear that there is no absolute right to engage in every kind of strike nor can a state be deprived of the power to deal with coercive conduct and unlawful practices. *Auto Workers* v. *Wisconsin Board, supra,* 336 U. S. at 264. The question in each case is whether restrictions placed upon concerted activities are reasonable.

It must be remembered that the employees in the case at bar are not government workers. Although their employer is not organized for profit, it is a private entity. Strikes in this area are not against the sovereign state nor in violation of any oath of office. Prohibition relating to such employees must therefore be framed with particular care to preserve First Amendment rights.

The decision below found that "a serious question of due process might arise" if the certification of appellant union by the New York State Labor Relations Board were not subject to immediate judicial review (Appellant's Appendix p. A16). Yet this Court has ruled precisely to the

contrary with respect to judicial review of unions certified under the provisions of the National Labor Relations Act, *supra* and the Railway Labor Act, 45 U.S.C. §§ 151 *et seq.* In *Railway Clerks* v. *Non-Contract Employees,* 380 U. S. 650 (1965), a suit challenging a ballot to be used in a representation election alleged that the National Mediation Board's failure to leave a space for voting "no union" was improper. The District Court found the form of the ballot to be invalid and enjoined the election. This Court reversed, holding that the matter was not subject to judicial review unless the Board exceeds its statutory authority:

> "The very nature of the arguments indicate that the Board's choice of its proposed ballot is not subject to judicial review, for it was to avoid the haggling and delays of litigation that such questions were left to the Board." (380 U. S. at 671.)

See in accord *Switchman's Union* v. *National Mediation Board,* 320 U. S. 297 (1943); *Fogg* v. *Randolph,* 244 F. Supp. 885 (S.D.N.Y. 1962); *Brotherhood of Locomotive Firemen and Enginemen* v. *Chicago Burlington and Quincy Railroad Company, et al.,* 225 F. Supp. 11 (D. C. 1964), aff'd per curiam 331 F. 2d 1020 (D. C. Cir. 1964), cert. den. 377 U. S. 918 (1964).

Unless the National Labor Relations Board exceeds its statutory powers, *Leedom* v. *Kyne,* 358 U. S. 184 (1958), its certifications cannot be directly challenged. *Boire* v. *Greyhound,* 376 U. S. 473 (1964). Federal courts examine certifications only where they are asked to enforce the findings of an unfair labor practice by an administrative agency; such review is an adjunct to determining whether disciplinary proceedings against the employer are warranted. See *American Federation of Labor* v. *N.L.R.B.,* 308 U. S. 401 (1940).

The dissent in the judgment below, after reviewing the similarities between the detailed provisions of the New York State Labor Relations Act and those of the Railway Labor Act concludes (Appellant's Appendix, p. A24):

> "It is our contention that the Legislature, in enacting Section 716 concluded that, in the interest of preserving the employees' Constitutional right to bargain collectively, the determination of a representative unit in non-profit making hospitals should lie solely with the State Labor Relations Board. The propriety of such a decision cannot be challenged in the light of the Supreme Court decisions, and in the light of the Legislature's own choice to avoid review by rejecting [a prior Legislature proposal which might have resulted in such review]."

The election being challenged by appellee hospital took place in July, 1964. After its certification by the State Labor Relations Board, and after rejection of its attempts to enter into negotiations as to contract terms, appellant union sought to invoke the provisions of § 716 of the Labor Law. The Industrial Commissioner first appointed a Fact-Finding Commission to inquire into the dispute and subsequently—upon the refusal of appellee hospital to accept the Commission's recommendations—ordered the commencement of arbitration. The majority in the court below found that the Industrial Commissioner had no authority to act in the dispute, indicating that it was an unfair labor practice for an employer to arbitrate with a minority union. The Court again referred to the "serious questions of due process" (Appellant's Appendix, p. A16) which would arise if there were no judicial review of the State Labor Relations Board certification prior to the commencement of arbitration, and said that the arbitration award would be rendered in a bilateral arbitration proceeding without giving necessary parties having a vital interest in the award an opportunity to be heard.

There are a number of misconceptions inherent in this reasoning. First, the employer cannot be penalized for dealing with a certified union. The very case cited by the decision (Appellant's Appendix, p. A17), *McGuire* v. *Humble Oil & Refining,* 355 F. 2d 352, cert. den. 384 U .S. 988, proves this point. The case concludes that it was an unfair labor practice for the employer to negotiate with a minority union when another union had already been certified as the proper representative. Thus, the court in *McGuire* relied upon the *certification* in determining with whom the employer should bargain.

Second, an employer has no valid interest in the results of an election in which it has no vote and with which it is prohibited from interfering. The U. S. Court of Appeals for the Second Circuit, in discussing the relation of an employer to the choice of its employees' representatives in *N.L.R.B.* v. *National Mineral Company,* 134 F. 2d 424, 426 (7th Cir. 1943), cert. denied 320 U. S. 753 (1943), stated:

> "It is the agent of the employees that is being chosen and not the agent of the employer. The employees have raised no question as to the proceedings in which their representative was selected. One would naturally expect the employer, unless prejudicially disposed towards unions, to be indifferent to the question of who is to be chosen to represent the employees. * * * The employer's interest and his great concern about whom the employees shall have as their representative for bargaining purposes are easily demonstrated as very unsubstantial. * * * In what forum in this land of ample legal machinery could the employees be heard to challenge the election of the stockholders' representative for collective bargaining?"

In *Foreman & Clark, Inc.* v. *N.L.R.B.,* 215 F. 2d 396 (9th Cir. 1954), cert. denied 348 U. S. 887, the Ninth Circuit

similarly questioned the employer's motives:

> "His self-interest may cause him to object to unionism in general; but once that objection is proved futile, of what possible concern can it be to him whether Group A of his employees is represented by Local 1 or Local 100? Or, if an employer objects to unionization of any kind, why should he hold out for even a larger unit than the one desired by his employees? Why should an employer, willing to accept a larger, comprehensive unit, haggle over the membership of a smaller one? What's Hecuba to him, or he to Hecuba?" 215 F. 2d 406-407.

However, the Court in the instant case ruled that employers "possess" (Appellant's Appendix, p. A14) a right of judicial review under § 707 of the State Labor Relations Act—that is, that the union is compelled to charge the employer hospital with an unfair labor practice so that in the course of the subsequent administrative hearing and judicial confirmation on this question, the issue of certification is reviewed. Since this cumbersome procedure must be completed before the arbitrators appointed under § 716 can hold hearings and begin to set out the general terms of a contract, it is unlikely that unions whose status is put into dispute would resort to the compulsory arbitration provisions. Thus there may be little further litigation in New York on this question, in spite of the broad practical impact of this holding.

The Court of Appeals explained its conclusion by stating (Appellant's Appendix, pp. A14-A15):

> "A decision that the validity of the Board's certification cannot be tested in the court until time consuming mediation, fact-finding and compulsory arbitration proceedings have been exhausted can only serve to delay the rendition of a prompt determination as to the representation issue, a delay which is not in the inter-

> est of the public, the voluntary hospitals or the unions, since unresolved representation issues may cause the very strife which the 1963 amendments were enacted to prevent."

Yet the effect of this ruling is to put the burden upon the union to go through "time consuming" administrative and court reviews of its certification, and to put the employees in the position of waiting indefinitely to ameliorate the terms and conditions of their employment. As pointed out by the dissent (Appellant's Appendix, pp. A25-A26).

> "Section 706, dealing with the prevention of unfair labor practices has permitted employees since 1937 to engage in strikes and other lawful, concerted activity while the unfair labor practice charge is investigated, and if it is sustained, while it is being reviewed by the Supreme Court. Thus, the employer has an avenue of review, and the employee is armed with effective weapons for penalizing dilatory tactics. This was in accord with the general policy of the entire act: 'It is in the public interest that equality of bargaining power be established and maintained.' (§ 700)
>
> • • •
>
> "As we interpret section 716, a prompt submission of disputes to collective bargaining and compulsory arbitration was a *quid pro quo* for the legislative prohibition of strikes in non-profit hospitals."

In order to serve as the *quid pro quo* for the ban on striking, arbitration must be a quick and efficacious remedy without interminable intermediate steps prior to its conclusion. Cf. *United Steel Workers* v. *Warrior & Gulf*, 363 U. S. 574, 581, 585 (1960).

A period of 2½ years was estimated by the court below to be the duration of an unfair labor practice proceeding and judicial review of the administrative determination

(Appellant's Appendix, p. A18, footnote 6). We must add to this a period of perhaps equal length for the holding of hearings before the arbitrator, the arbitrator's decision, and a limited judicial review of this decision. The case at bar, therefore, impairs the right of non-profit hospital workers to act in concert to better their working conditions, since they may not strike, are not recognized by their employer, and must wait for four years or more before their representative is actually permitted by law to consummate a collective bargaining agreement on their behalf.

CONCLUSION

For the foregoing reasons it is respectfully requested that this Court note probable jurisdiction and grant plenary consideration to the instant appeal.

Dated: New York, New York, February 14, 1969.

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
as *Amicus Curiae*

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

MARIA L. MARCUS
AMY JUVILER
Assistant Attorneys General,
of Counsel.



SUPREME COURT, U. S.

Supreme Court of the United States

OCTOBER TERM, 1968

Supreme Court, U.S.
FILED
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No. 1045

PETER OTTLEY, as President, and PETER BYRNE, as Secretary-Treasurer, of Local 144, Hotel & Allied Service Employees Union, Service Employees International Union, AFL-CIO,

Appellant,

against

THE LONG ISLAND COLLEGE HOSPITAL,

Appellee.

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Appellant,

against

THE LONG ISLAND COLLEGE HOSPITAL

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS APPEAL

THEODORE R. ISERMAN,
Attorney for Appellee,
350 Park Avenue,
New York, New York 10022.

FREDERICK T. SHEA,
EUGENE T. D'ABLEMONT,
KELLEY DRYE NEWHALL MAGINNES &
WARREN
Of Counsel.



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Supreme Court of the United States

October Term, 1968

No. 1045

PETER OTTLEY, as President, and PETER BYRNE, as Secretary-Treasurer, of Local 144, Hotel & Allied Service Employees Union, Service Employees International Union, AFL-CIO,

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Appellant,

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Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS APPEAL

Appellee, The Long Island College Hospital, a voluntary, non-profitmaking hospital, hereby moves to dismiss the appeal herein on each of the following grounds:

1. The federal questions that appellant claims this appeal presents are hypothetical questions and concern issues that the facts of the cases here involved do not raise.

2. Consequently, the Court of Appeals of the State of New York did not pass on the questions that appellant now wishes to present and resolution of those questions was in no way pertinent to the State court's decision.

3. In any event, appellant did not raise the alleged federal questions at the earliest opportunity in the State courts, but, instead, first raised them on a motion for reargument, notwithstanding that the decision of the New York Court of Appeals could reasonably have been anticipated since it merely adopted the construction of a State statute that appellee continually urged throughout the litigation.

4. Finally, the State court in these cases did not in any way pass on the *validity* of the statute that these cases involve, but merely construed it not to apply in the circumstances the cases present.

Relevant Statutory Provisions

Since 1937, New York has had a State Labor Relations Act or "Little Wagner Act" (L. 1937, C. 443), whose provisions for the most part parallel those of the National Labor Relations Act before its amendment in 1947 (49 Stat. 449). Thus, Section 703 of the State Act conferred on employees the same rights to organize and bargain collectively that Section 7 of the National Act gave them; Section 704, like Section 8 of the National Act, made an employer's re-

fusing to bargain with the "representatives" of his employees an unfair labor practice; Section 705, like Section 9 of the National Act, provided for designating and certifying representatives; Section 706 empowered the State Labor Relations Board to prevent unfair labor practices, including refusals to bargain, and Section 707, like Section 10 of the National Act, provided for enforcing and reviewing orders of the Board. Section 706(1), like Section 10(a) of the National Act, made the State Labor Board's authority to rule on questions concerning representation exclusive.

The original State law, in Section 715, excluded from its application "employees of any charitable, educational or religious association or corporation," including employees of non-profitmaking hospitals. In 1963, however, the legislature amended Section 715 so that, for the first time, unions of such employees (whom the National Act also excluded from its terms) could invoke the State Act to become certified representatives and, without striking or picketing, compel such hospitals to recognize and bargain collectively with them.

It was well settled that, besides being excluded from the coverage of the National and State Acts, unions of hospital employees could not lawfully strike hospitals to force them to recognize unions or to bargain with them. *Jewish Hospital of Brooklyn* v. *"John Doe,"* 252 App. Div. 581, 300 N. Y. 1111 (1937); *Society of New York Hospital* v. *Hanson,* 185 Misc. 937, 59 N. Y. S. 2d 91 (1945), *aff'd,* 272, App. Div. 998, 73 N. Y. S. 2d 835 (1947); *Beth-El Hospital* v. *Robbins,* 186 Misc. 506, 60 N. Y. S. 2d 798 (1946); *Mount Sinai Hospital* v. *Davis,* 17 Misc. 2d 727, 188 N. Y. S. 2d 338 (1959).*

At the same time that it made the procedures of the State Act applicable to hospital employees and their unions,

---

* Protagonists of unions of hospital employees are fond of saying that amendments of the State Act requiring voluntary hospitals to bargain collectively with their employees and providing for compulsory arbitration of "disputes" over terms of collective bargaining contracts were the quid pro quo for the "loss" of their right to strike—a right that, as these cases hold, they never had.

the New York legislature, in language it borrowed from the second ("publicity") proviso of Section 8(b)(4) of the National Act, provided in Section 713 that it would continue to be unlawful for such employees and their unions to strike or picket non-profitmaking hospitals, provided that "nothing herein shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public of the existence of" an economic dispute that, by the terms of Section 716, was subject to fact-finding and compulsory arbitration.*

Statement of the Case

On December 28, 1964, nineteen months after appellant Local 144 had petitioned for certification as the representative of "all non-professional employees" of The Long Island College Hospital, the State Labor Relations Board certified it as the representative of certain maintenance employees of the Hospital. The Hospital believed that in these protracted proceedings the Board had committed egregious errors (which included two violations of its own rules and regulations and a holding that 21 votes constituted a majority of 46 votes) that rendered the certification invalid.

In order to obtain, in the only way it could (i.e., by proceedings under Sections 706 and 707), review of the Board's certification, the Hospital advised Local 144 that it was refusing to bargain with the union and offered to cooperate in expediting a determination as to the validity of the certification.

Instead of filing an unfair labor practice charge, Local 144 sought to invoke Section 716 of the Labor Law authoriz-

* Section 716, in providing for the submission of "disputes" to fact-finding and compulsory arbitration, carefully, narrowly and precisely excludes from the ambit of the term controversies over the representation of employees, and Section 702(9) forbids the Industrial Commissioner, who has jurisdiction under Section 716, to deal with such controversies.

ing the Industrial Commissioner of New York to order fact-finding and compulsory arbitration for the settlement of "disputes" as the section narrowly defines that term. The Hospital instituted two proceedings in the New York courts that were consolidated in the Court of Appeals, and from the decision in which Local 144 now seeks to appeal to this Court. In both proceedings, the Hospital contended that the controversy between it and Local 144 concerned the status of Local 144 as the representative of employees of the Hospital; that this controversy was subject to review only in the manner Sections 706 and 707 set forth, and that it did not constitute a "dispute" under Section 716 over which the Industrial Commissioner could assert jurisdiction. Both proceedings therefore involved the question, as the Court of Appeals expressed it (Appellant's Jurisdictional Statement, A. 8):

> "Where a nonprofitmaking hospital challenges the representation status of a union, does section 716 of the New York State Labor Law, enacted in 1963, empower the New York State Industrial Commissioner to appoint a fact-finding commission to make recommendations for the settlement of the dispute and, if its recommendations are rejected, to submit the issues to compulsory arbitration before the New York State Board of Mediation?"

The Court below answered that question in the negative and thereby refused to apply the provisions of Section 716 to the controversy between Local 144 and the Hospital concerning the representation of the employees.

The Claimed Federal Questions

In its Jurisdictional Statement in support of this appeal, appellant maintained that by construing Section 716 of the New York Labor Law as not applying to controversies over representation, the New York Court of Appeals has rendered unconstitutional another and different section of the Labor Law, Section 713, prohibiting strikes and re-

stricting picketing by employees of non-profitmaking hospitals. Appellant further contends that the State Court's construction of Section 716 makes that section, also, an unconstitutionally inadequate substitute for the right to strike and picket that appellant (but not the Court below) construes Section 713 as proscribing. Appellant argues that a non-existent holding of the Court of Appeals imposes on unions of hospital employees "the requirement of compulsory judicial review of their certifications" in violation of the First and Fourteenth Amendments, and that Sections 716 and 713, as the appellant (but no court) construes them, deprive hospital employees of the equal protection of the laws.

ARGUMENT

I. The federal questions that appellant presents are hypothetical and there is no case or controversy involving them.

The foregoing Statement of the Case shows without question that this appeal in no way involves the construction, application, and/or the constitutional validity of Section 713's restrictions on strikes and picketing by employees of non-profitmaking hospitals. There is no evidence that either appellant Union or any employees of the Hospital at any time engaged or attempted to engage in striking, picketing or publicity. Neither the Hospital nor anyone on behalf of the Hospital has attempted to enforce the provisions of Section 713 against appellant or any employees of the Hospital. The decision of the Court of Appeals does not in any way restrict striking, picketing or publicity by the Union over its demand for recognition. In these circumstances, it is clear that appellant, by this appeal, seeks to obtain from this Court an advisory opinion unrelated to the facts of the case, on the constitutionality of Section 713. Indeed, in the very first point of its Jurisdictional Statement, appellant argues (at page 12):

"1. Section 713 of the New York Labor Law as construed by the Court below constitutes an interference with rights guaranteed by the First Amendment."

The Court below did not construe or enforce Section 713. It hardly requires citation of authority to support the proposition that this Court will not entertain a constitutional question in advance of the necessity of deciding it. But this Court's remarks in *Asbury Hospital* v. *Cass County,* 326 U. S. 207, 213-14 (1945) and *Longshoremen's Union* v. *Boyd,* 347 U. S. 222, 223-24 (1954), are particularly applicable to the circumstances of this appeal. In the *Asbury Hospital* case, *supra,* this Court said:

> "We are thus asked to pass upon the constitutionality of a possible application of the state statute in advance of its application to appellant and of its authoritative construction by the state courts. Lacking such construction, without which no constitutional question can arise, the issue is not an appropriate one for adjudication by the declaratory judgment procedure. This Court is without power to give advisory opinions. It will not decide constitutional issues which are hypothetical, or in advance of the necessity of deciding them, or without reference to the manner in which the statute, whose constitutional validity is drawn in question, is to be applied. *Federation of Labor* v. *McAdory,* 325 U. S. 450, 459-463, and cases cited."

Again, in the *Longshoremen's* case, *supra,* this Court stated:

> "Appellants in effect asked the District Court to rule that a statute the sanctions of which had not been set in motion against individuals on whose behalf relief was sought, because an occasion for doing so had not arisen, would not be applied to them if in the future such a contingency should arise. That is not a lawsuit to enforce a right; it is an endeavor to obtain a court's assurance that a statute does not govern hypothetical situations that may or may not make the challenged statute applicable."

Appellant's contention that by imposing "the requirement of compulsory judicial review only upon unions representing voluntary hospitals" the statute (appellant does not cite any particular section) violates the First and Fourteenth Amendments, rests on nothing remotely resembling anything the Court below said. It did not require anyone, unions or hospitals, to seek judicial review. The Court merely held that the Industrial Commissioner and his appointees may not review certifications under Section 716 and that this section does not deprive non-profitmaking hospitals of the right of judicial review that employers generally have under Section 707 of the State Act and under Section 10(f) of the National Act. If the basis for this argument is that Section 713 restricts striking and picketing by unions of hospital employees, then it presupposes a decision with respect to that section that the Court below did not make and was not called upon to make. If and when the circumstances of a particular case call upon the Court to determine the validity of Section 713, it cannot be assumed that the Court will decide the case incorrectly, as appellant wishes this Court to assume. This applies, also, to appellant's contention in its Point 3 that Sections 713 and 716 deprive employees of voluntary hospitals of the equal protection of the laws.

Since the Court below did not hold that Sections 716 and 713 proscribe striking, picketing or publicity, it did not rule on the adequacy of Section 716 as a substitute for the right to strike or on the need for such a substitute.

II. The State Court did not pass on the questions the appellant is trying to raise and their resolution was in no way pertinent to the Court's decision.

As the New York Court of Appeals itself made clear, the only question before it, and the only question it decided, was whether Section 716 compelled the Hospital to submit to fact-finding and binding arbitration a controversy over appellant's representation status. Obviously, resolving that question of statutory construction could in no way

involve determining the meaning and constitutionality of that section or of a completely different section of the Labor Law if it should be invoked against the appellant at some time in the future and if the State court construed it as appellant seeks to have this Court construe it. Even where a State court says it passed on a particular federal question, this Court will not assume jurisdiction if, on examining the record, it fails to find the federal question was necessary to the decision. *Lynch* v. *New York,* 293 U. S. 52 (1934); *Honeyman* v. *Hanan,* 300 U. S. 14, 18 (1937). Here, the record is completely devoid of support for the claim that the Court of Appeals in any way passed on the constitutionality of the New York Labor Law's restrictions on strikes and picketing. Not only is no injunction against appellant's striking, picketing or publicizing now in effect; no such injunction has ever issued. *Cf., Oil Workers Unions* v. *Missouri,* 361 U. S. 363 (1960).

III. Appellant did not raise the alleged federal questions at the earliest opportunity in the State Court.

In its Jurisdictional Statement (page 10), appellant admits that it did not raise in the State courts the federal questions it now presents until after the Court of Appeals rendered its decision on the consolidated appeal. Appellant attempts to excuse this delay by claiming "surprise" at the Court's decision.

From the very beginning of this litigation, in each of the courts in which these cases were argued, appellee Hospital consistently contended that the fact-finding and arbitration provisions of Section 716 were not available to a union to resolve a controversy over the validity of the union's certification. Indeed, in June, 1966, long before the decision of the Court of Appeals in these cases, the Appellate Division held:

> "The disputes provision of section 716 of the Labor Law is not sufficiently broad to include a dispute over the right to exclusive representation by a union,

> the propriety of a bargaining unit, or any other issue raised as to the correctness of certification of an exclusive bargaining agent.'"*

Even if, as appellant now claims, such a construction of Section 716 would make Section 713's restrictions on strikes and picketing unconstitutional, by what tortuous reasoning can appellant now claim to be "surprised" that the determination of these cases presents such a constitutional issue?

While it may be that a sense of righteous self-confidence had lulled appellant into an unfounded optimism about the outcome of the litigation, surprise at finding oneself on the losing end of a legal argument is not the kind of "surprise" that justifies procrastinating until a motion for reargument to raise the federal questions that the construction of Section 716 is now claimed to pose.

IV. The State Court did not pass on the validity of any section of New York's Labor Law to which appellant refers in the questions it presents on this appeal.

28 U. S. C. 1257(2) grants to this Court jurisdiction to review final judgments or decrees of a State court:

> "(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

The State court in this case did not rule on the *validity* of either section of the State statute that appellant claims this appeal involves. The decision of the New York Court of Appeals makes crystal clear that the Court held that Section 716 of the New York Labor Law, whether valid or not, was not intended to apply, and did not apply, to disputes concerning the representation of employees. Notwithstanding appellant's contending that the construction that the State court gave Section 716 makes both that Section and

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* 26 App. Div. 543 (1966).

Section 713 of the Labor Law unconstitutional, the fact remains that the Court did not and, indeed, had no need to pass on, the *validity* of either section, since it was not applying either one against any of the parties to these cases. As this Court had occasion to point out in *Ferry* v. *King County*, 141 U. S. 668, 673 (1891):

> "We have repeatedly held that the validity of a statute is not drawn in question every time rights claimed under such statute are controverted, nor is the validity of an authority every time an act done by such authority is disputed."

In the present case, as the record clearly shows, appellant contended that Section 716 of the New York Labor Law authorized State officials to compel the Hospital to submit to fact-finding and arbitration procedures with respect to the Union's representative status. The Court of Appeals disagreed with appellant and decided that Section 716 was not intended to apply to the controversy these cases involve. It is inconceivable that in doing so the State court decided in favor of the validity of any relevant State statute.

Conclusion

For each of the reasons set forth above, appellee Hospital respectfully submits that the within appeal should be dismissed.

Respectfully submitted,

THEODORE R. ISERMAN,
Attorney for Appellee,
350 Park Avenue,
New York, New York 10022.

FREDERICK T. SHEA,
EUGENE T. D'ABLEMONT,
KELLEY DRYE NEWHALL
MAGINNES & WARREN,
Of Counsel.

APPENDIX

Relevant Statutory Provisions

New York Labor Law:

§ 702. Labor relations board

9. Notwithstanding the provisions of any other law, neither the industrial commissioner nor any board or other agency of the department of labor shall in any way direct, review, modify or reverse any decision or finding of the board nor shall the industrial commissioner or any board or other agency of the department of labor supervise or control the board in the exercise of any powers or in the performance of any duties under this article.

§ 703. Rights of employees

Employees shall have the right of self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection, free from interference, restraint, or coercion of employers, but nothing contained in this article shall be interpreted to prohibit employees from exercising the right to confer with their employer at any time, provided that during such conference there is no attempt by the employer, directly or indirectly, to interfere with, restrain or coerce employees in the exercise of the rights guaranteed by this section.

§ 704. Unfair labor practices

It shall be an unfair labor practice for an employer:

6. To refuse to bargain collectively with the representatives of employees, subject to the provisions of section seven hundred five.

§ 705. Representatives and elections

1. Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes or by the majority of the employees voting in an election conducted pursuant to this section shall be the exclusive representatives of all the employees in the appropriate unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, that employees, directly or through representatives, shall have the right at any time to present grievances to their employer.

2. The board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization, to collective bargaining and otherwise to effectuate the policies of this article, the unit appropriate for the purposes of collective bargaining shall be the employer unit, multiple employer unit, craft unit, plant unit, or any other unit; provided, however, that in any case where the majority of employees of a particular craft, or in the case of a non-profitmaking hospital or residential care center where the majority of employees of a particular profession or craft, shall so decide the board shall designate such profession or craft as a unit appropriate for the purpose of collective bargaining.

3. Whenever it is alleged by an employee or his representative, or by an employer or his representative, that there is a question or controversy concerning the representation of employees, the board shall investigate such question or controversy and certify in writing to all persons concerned the name or names of the representatives who have been designated or selected. In any such investigation the board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section seven hundred six or otherwise, and may conduct an election by secret ballot of employees, or use any other suitable method to ascertain such representatives (either

before or after the aforesaid hearing), provided, however, that the board shall not have authority to investigate or determine any question or controversy between individuals or groups within the same labor organization nor between labor organizations affiliated with the same parent labor organization concerning the internal affairs of any labor organization but nothing contained in this proviso shall be deemed to preclude the board from investigating and determining which, if any, of affiliated groups or labor organizations have been designated or selected by employees as their representatives for the purposes of collective bargaining within the meaning of this article.

4. The board shall have power to determine who may participate in the election and to establish the rules governing any such election: Provided, that no election need be directed by the board solely because of the request of an employer or of employees prompted thereto by their employer, nor shall any individuals employed only for the duration of a strike or lockout be eligible to vote in such election; and provided further, that no such election shall be conducted under the employer's supervision, or, except as may be required by the board, on the employer's property, during working hours, or with his participation or assistance.

5. If at an election conducted pursuant to this section three or more nominees for exclusive collective bargaining representatives appear on the ballot and no one of them receives a majority of the votes cast at the election, the two nominees who received the highest number of votes shall appear on the ballot of a second election to be conducted hereunder, and the one receiving a majority of the votes cast at the second election shall be the exclusive representative of all the employees in such unit for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.

6. A labor organization nominated as the representative of employees shall be listed by name on the ballots author-

ized by subdivision three of this section. In any investigation conducted by the board pursuant to this section the board may make a finding as to whether any committee, employee representation plan, or association of employees involved is a company union, and if any such committee, employee representation plan, or association of employees be found to be a company union, it shall not be listed on the ballots, certified or otherwise recognized as eligible to be the representative of employees under this article.

§ 706. Prevention of unfair labor practices

1. The board is empowered and directed, as hereinafter provided, to prevent any employer from engaging in any unfair labor practice. This power shall not be affected or impaired by any means of adjustment, mediation or conciliation in labor disputes that have been or may hereafter be established by law.

§ 707. Judicial review

1. The board shall have power to petition the supreme court of the state within the county wherein the unfair labor practice in question occurred or wherein any person charged with the unfair labor practice resides or transacts business, or if such court be on vacation or in recess, then to the supreme court of any county adjoining the county wherein the unfair labor practice in question occurred or wherein any person charged with the unfair labor practice resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was made and the findings and order of the board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restrain-

ing order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the board.

2. No objection that has not been urged before the board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the board as to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the board, its member, agent, or agency, the court may order such additional evidence to be taken before the board, its member, agent, or agency, and to be made a part of the transcript. The board may modify its finding as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and shall file its recommendations if any, for the modification or setting aside of its original order.

3. The jursidiction of the supreme court shall be exclusive and its judgment and decree shall be final, except that appeals shall lie to the appellate division of said court and to the court of appeals, in the manner and subject to the limitations provided in the civil practice act irrespective of the nature of the decree or judgment or the amount involved.

4. Any person aggrieved by a final order of the board granting or denying in whole or in part the relief sought may obtain a review of such order in the supreme court of the county where the unfair labor practice in question was alleged to have been engaged in or wherein such person

resides or transacts business by filing in such court a written petition praying that the order of the board be modified or set aside, or if such court be on vacation or in recess, then to the supreme court of any county adjoining the county wherein the unfair labor practice in question occurred or wherein any such person resides or transacts business. A copy of such petition shall be forthwith served upon the board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the board, including the pleading and testimony and order of the board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the board under subdivision one of this section, and shall have the same exclusive jurisdiction to grant to the board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the board; and the findings of the board as to the facts shall in like manner be conclusive.

5. The commencement of proceedings under subdivisions one and four of this section shall not, unless specifically ordered by the court, operate as a stay of the board's order.

6. When granting appropriate temporary relief or a restraining order, or making and entering a decree enforcing, modifying and enforcing as so modified or setting aside in whole or in part an order of the board, as provided in this section, the jurisdiction of courts sitting in equity shall not be limited by acts pertaining to equity jurisdiction of courts.

7. Petitions filed under this article shall be heard expeditiously and shall be considered and determined upon the transcript filed, without requirement of printing. Upon the filing of a record in the supreme court, the case shall be heard with greatest possible expedition, and shall take precedence over all other matters except matters of the same character.

§ 713. Limitations

Nothing in this article shall be construed so as to interfere with, impede or diminish in any way the right of employees to strike or engage in other lawful, concerted activities, except that it shall continue to be unlawful for the employees of a non-profitmaking hospital or residential care center, or their representatives, or any other persons to engage in or to induce or encourage, or to attempt to engage in or to induce or encourage any strike, work stoppage, slowdown or withholding of goods or services by such employees or other persons at such hospital or residential care center, provided, however, that nothing herein shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public that a grievance or dispute, as defined in section seven hundred sixteen of this article, exists at such hospital or residential care center, as long as such publicity does not have the effect of inducing any persons to withhold goods or services at such hospital or residential care center.

It shall be unlawful for a non-profitmaking hospital or residential care center to institute, declare or cause, or to attempt to institute, declare or cause any lockout of the employees of such hospital or residential care center.

§ 715. Application of article

The provisions of this article shall not apply to: (1) employees of any employer who concedes to and agrees with the board that such employees are subject to and protected by the provisions of the national labor relations act or the federal railway labor act; or (2) employees of the state or of any political or civil subdivision or other agency thereof; or (3) employees of any charitable, educational or religious association or corporation, no part of the net earnings of which inures to the benefit of any private shareholder or individual, except that the provisions of this article shall apply to (a) employees of any such charitable, educational or religious association or corporation whose

services are performed in connection with the operation of a building owned or operated by such an association or corporation and used or occupied as a commercial or industrial enterprise operated for the production of profit, irrespective of the purposes to which such profit may be applied, and which employees are not engaged in the charitable, educational or religious activities of such association or corporation and (b) employees of a non-profitmaking hospital or residential care center.

§ 716. Grievances and disputes in non-profitmaking hospitals and residential care centers

1. As used in this section "grievance" means any controversy or claim arising out of or relating to the interpretation, application or breach of the provisions of an existing collective bargaining contract. As used in this section "dispute" means all other controversies, claims or disputes between the employees of a non-profitmaking hospital or residential care center, or their representatives, and such hospital or residential care center concerning wages, hours, union security, seniority or other economic matters, including, but not limited to, controversies, claims or disputes arising in the course of negotiating, fixing, maintaining, changing or arranging such terms or conditions.

2. Every collective bargaining contract between the employees of a non-profitmaking hospital or residential care center, or their representatives, and such hospital or residential care center which does not contain provisions for the final and binding determination of grievances shall be deemed to include provision for the submission of such grievances, upon the request of either or both parties, to arbitration pursuant to such rules as may be established from time to time by the New York state board of mediation.

3. Every collective bargaining contract between the employees of a non-profitmaking hospital or residential care center, or their representatives, and such hospital or resi-

dential care center which does not contain provisions for the final and binding determination of disputes shall be deemed to include provisions for:

(a) the appointment of a fact-finding commission by the New York state board of mediation upon the request of both parties to the dispute, or by the industrial commissioner upon his own motion and upon certification by such board that in its opinion efforts to effect a voluntary settlement of the dispute have been unsuccessful. Such fact-finding commission shall have all of the powers and duties, including the power to make recommendations for the settlement of the dispute, as are vested in a board of inquiry by article twenty-two of this chapter; and

(b) the submission of the dispute to arbitration, pursuant to such rules as may be established from time to time by the New York state board of mediation, by such board of mediation upon the request of both parties to the dispute, or by the industrial commissioner upon his own motion and upon certification by such board of mediation that in its opinion efforts to effect a voluntary settlement of the dispute have been unsuccessful.

4. In the absence of a collective bargaining contract between the employees of a non-profitmaking hospital or residential care center, or their representatives, and such hospital or residential care center, the New York state board of mediation and the industrial commissioner may, in the manner and upon the conditions provided in subdivision three of this section, exercise all of the powers vested in them by the provisions of such subdivision of such section.

5. Nothing in this section shall be deemed to affect, impair or alter any collective bargaining contract between the employees of a non-profitmaking hospital or residential care center, or their representatives, and such hospital or residential care center which was executed prior to July first,

nineteen hundred sixty-three, during the term of such contract.

6. The supreme court shall have jurisdiction, to confirm, modify, correct or vacate any arbitration award made pursuant to the procedure established by this section, in the manner provided by article eighty-four of the civil practice act. The supreme court shall have jurisdiction, upon such notice as it deems appropriate, to restrain or enjoin any violation of the provisions of this section or section seven hundred thirteen and to grant such other and further equitable relief as may be appropriate. The provisions of section eight hundred seventy-six-a of the civil practice act shall not apply to an action or proceeding instituted pursuant to this section or section seven hundred thirteen.

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Supreme Court of the United States

October Term, 1968

No. 1045

PETER OTTLEY, as President, and PETER BYRNE, as Secretary-Treasurer, of Local 144, Hotel & Allied Service Employees Union, Service Employees International Union, AFL-CIO,

Appellant,

against

THE LONG ISLAND COLLEGE HOSPITAL,

Appellee.

IN THE MATTER OF

PETER OTTLEY, as President, and PETER BYRNE, as Secretary-Treasurer, of Local 144, Hotel & Allied Service Employees Union, Service Employees International Union, AFL-CIO,

Appellant,

against

THE LONG ISLAND COLLEGE HOSPITAL,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

APPELLANT'S REPLY BRIEF

STEPHEN C. VLADECK,
Attorney for Appellant,
165 West 46th Street,
New York, N. Y. 10036.

JUDITH P. VLADECK,
VLADECK, ELIAS, FRANKLE,
VLADECK & LEWIS,
Of Counsel.

Supreme Court of the United States

OCTOBER TERM, 1968

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Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

APPELLANT'S REPLY BRIEF

Appellant submits this brief in reply to appellee's motion to dismiss the appeal herein. The order of the points follows that of appellee's argument.

Preliminarily, certain factual statements must be disputed:

1. Appellee states that Section 713 provides that "it would *continue to be unlawful* for such employees and their unions to strike or *picket* non-profitmaking hospitals, . . ."

(Emphasis added.) (Appellee's Brief, p. 4). The statute does not so read (A37) *, nor had it ever been unlawful, prior to the enactment of Section 713, for hospital employees to picket. See cases cited, Jurisdictional Statement, p. 13.

2. The view that the availability of compulsory arbitration was a *quid pro quo* for the prohibition against strike or picketing is neither partisan nor limited "to protagonists of unions of hospital employees" (Appellee's Brief, ftn., p. 3). Both the majority and minority opinions of the Court of Appeals made clear that the dispute procedures were designed as a balance to the deprivations created by Section 713. The majority said, for example:

> "Further, the Legislature well knew that, although the courts had enjoined hospital employees from striking and that it was in the public interest to continue the prohibition against strikes, it would have been unjust to deprive hospital employees of their most potent economic weapon without granting them adequate means of securing relief against substandard wages and working conditions" (A8-9).

The majority thereafter outlined the three "vital amendments" by which the Legislature attempted to resolve these problems; Sections 713, 715 and 716.

The minority said:

> "As we interpret section 716, a prompt submission of disputes to collective bargaining and compulsory arbitrations was a *quid pro quo* for the legislative prohibition of strikes in nonprofit hospitals. Such an analysis, we submit, preserves the equality of bargaining power, considered essential to the entire Act" (A26).

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* References to "A" are to Appendix to Jurisdictional Statement.

3. Appellee accuses the New York State Labor Relations Board of "holding that 21 votes constituted a majority of 46 votes" (Appellee's Brief, p. 4). Appellee's own affidavit (R., Vol. I, pp. 12-14, paras. 9 and 10) * and the affidavit of Commissioner Jay Kramer (R., Vol. I, p. 80) completely refute this statement and raise a doubt only as to the purpose for which it was offered.

4. Appellee's statement " . . . as the record clearly shows, appellant contended that Section 716 . . . authorized State officials to compel the Hospital to submit to fact-finding and arbitration procedures with respect to the union's representative status" (Appellee's Brief, p. 11) is an unwarranted distortion of the record. Not surprisingly, appellee offers no citation to the record. Appellant contended only that its representative status had been established; that it was entitled to have *its contract demands* submitted to fact-finding and arbitration in the face of the Hospital's refusal to bargain with it (See e.g. R., Vol. II, p. 62).

POINT I

The issues on this appeal arise from an actual controversy within the jurisdiction of the Court.

The Court of Appeals ordered that the compulsory arbitration in which the appellant and appellee were participating under the direction of the Industrial Commissioner be stayed.

Appellee contends that although the appellant is deprived of the remedy of arbitration, it *can* strike and

* References to "R" are to the Record on this appeal.

picket, albeit in violation of Section 713, and, since it has not done so, there is no case or controversy within this Court's jurisdiction.

In support of its contention, appellee says: "the decision of the Court of Appeals does not in any way restrict striking, picketing or publicity by the Union . . ." (Appellee's Brief, p. 6). The decision did not have to; Section 713 does.

The appellee's argument is couched in the misleading frame of a separate statute, Section 716 standing alone, so as to claim that the statutory restraint on strike or picketing has not been placed in issue. New York did not enact such a statute. Sections 713 and 716 were and are part of one statute which can only be read in *pari materia.**

Neither the cases cited by appellee ** nor any other case defining "case" or "controversy" requires that the appel-

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* New York Law is clear that it is the duty of the courts to construe all parts of a statute together. See McKinney's Book 1, "Statutes" authoritative and semi-official treatise on the construction of statutes enacted by the legislature in New York. Section 221, which deals generally with the construction of statutes in *pari materia,* states that such statutes "are to be construed together as forming part of the same statute . . . (citing authorities). Section 97 is in accord. Appellee has no basis for claiming that the Court of Appeals violated the canons of statutory construction.

** The *Asbury Hospital* case (326 U. S. 207) and *Longshoremen's* case (347 U. S. 222) cited by appellee, if read in full, are clearly distinguishable. The point in issue in *Asbury* which the Court deemed hypothetical, had not in fact been raised before any state court and was clearly an anticipatory, rather than actual, threat to any right. *Longshoremen's* sought a declaration that a section of the Immigration and Naturalization Act, if applied at all, would invade constitutional rights. In the case at bar, the arbitration was stayed, while Section 713's restraints were not removed.

lant violate Section 713's ban on strike or picketing in order to assert that its rights under that Section and Section 716 are actually, and not hypothetically, impaired. *Nashville, C. & St. L. Ry.* v. *Wallace*, 288 U. S. 249.

Appellee deliberately misses the point; if there were no Section 713 restraint on strike and picketing, the availability of substitutes would be academic and might, in fact, pose only hypothetical questions. If the Union could use self-help, the Court's construction of Section 716 would not have created an invasion of appellant's rights; it could ignore it and strike or picket. The effect of the twin impediments to any remedy (Section 713 and the Court's construction of Section 716) is not hypothetical. The Union appellant can neither strike, picket nor avail itself of the statutory alternative—compulsory arbitration.

POINT II

The Court of Appeals necessarily passed on the questions presented on this appeal.

The Court of Appeals had before it in this case the first statute ever enacted in New York providing for compulsory arbitration while restraining strike or picketing. The issue of the validity of the legislative experiment in avoiding labor disputes was of such compelling importance that not only did the parties brief and argue the meaning and the constitutionality of the statute exhaustively, but a substantial number of *amicus* briefs were submitted.

Appellee suggests, however, that the Court of Appeals' decision, in "resolving that question of statutory construction, could in no way involve determining the meaning and constitutionality of that section . . ." (Appellee's Brief, pp. 8-9).

Appellee's argument answers itself. The cases cited by appellee for its proposition that the Court either did not pass on any federal question, or that the federal question, was not necessary to its decision, do not support its proposition.*

POINT III

The precise federal question sought to be reviewed did not arise until the Court of Appeals rendered its decision, nor could its decision reasonably have been anticipated.

The validity of the amendments to the New York State Labor Relations Act had never before been passed upon by the highest court of New York. Appellee attacked its validity from the outset of this litigation; both proceedings sought, in part, a declaration that Section 716 violated the Constitution of the United States and was, for other reasons, an invalid exercise of legislative power.

The validity of the statute was also placed in issue by other actions which were commenced during the course

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* In *Lynch*, 293 U. S. 52, the petitioners had not sought amendment to the remittitur, although they had an opportunity to do so; in *Honeyman*, 300 U. S. 14, 26, this Court remanded the case to the state court, "in order that uncertainty be removed and the precise nature of the federal question, how it was raised, and the grounds of its disposition may be definitely set forth; so that we may be able to decide whether a substantial federal question within our jurisdiction has necessarily been determined."

Following the decision of the Court of Appeals, appellant moved for amendment of the remittitur for just that purpose; to clarify the federal questions created by the court's decision. The Court of Appeals summarily denied the motion.

The citation of the *Oilworkers* case (361 U. S. 363), is not helpful. There, an injunction against a strike was separated from other penalties against the strikers. As to the injunction, which had long since been vacated at the time of the appeal, the issue was considered moot.

of this litigation.* In those cases, the hospital plaintiffs also argued that the Act denied charitable hospitals the equal protection guaranteed by the Federal Constitution in that they were the only class of employers subject to a law providing for compulsory arbitration.

None of the judges who had heard any of the attacks upon the validity of the statute even suggested the possibility of the decision ultimately reached by a divided Court of Appeals; that is, the implicit holding that the statute was not invalid *if* read so as to make arbitration or fact-finding available *only* to a union of hospital workers which had received judicial approval of its certification. If that idea had not occurred to any of the more

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* In *The Park Avenue Clinical Hospital* v. *Kramer, et al.*, 48 Misc. 2d 826, 266 N. Y. S. 2d 147 (Sup. Ct. Monroe Cty., 1966) the employer argued that the sections of the Act in question were unconstitutional for the reason that charitable hospitals are the only class of employers subject to them; that the employer is subjected to a law prohibiting picketing, strikes and lockouts and providing for compulsory arbitration, whereas profitmaking hospitals are not, and, therefore, it is denied the equal protection guaranteed by both Federal and State constitutions. The Court, at Special Term, rejected this contention.

On appeal, the Appellate Division (26 A. D. 2d 613, 271 N. Y. S. 2d 747 (4th Dept.), holding that the provisions involved were valid and constitutional, declared that the employer's attack on Section 716 was premature and that the constitutionality of this section should not be reached or passed upon in this action. The Court noted that all that had taken place in this case was that a union had filed a petition with the Board, pursuant to Section 705, asking to be certified as collective bargaining representative of certain groups of employees; that following an informal conference, the employer commenced this action. The Court concluded that the employer procedurally was far removed from any of the provisions of Section 716. The Court of Appeals affirmed the holding of the Appellate Division (19 N. Y. 2d 958).

Similar results were reached in *Crouse Irving Hospital* v. *Kramer*, 25 A. D. 2d 817 (4th Dept. 1966); *St. Joseph's Hospital* v. *Kramer*, 25 A. D. 2d 817 (4th Dept. 1966); and *Syracuse Memorial Hospital* v. *Kramer*, 25 A. D. 2d 817 (4th Dept. 1966).

than twenty Special Term or Appellate Division judges who had examined the statute, the appellant can hardly be charged with obtuseness or procrastination in failing to anticipate the decision of the Court of Appeals. The statute itself does not, in terms, provide for such prior judicial approval. Nothing in the legislative history suggested that it was the intent of the Legislature to create such a condition upon the availability of fact-finding or arbitration. None of the judges of Special Term, nor of the Appellate Division, discerned any merit in the appellee's argument that the Legislature must have intended such judicial review.

Even the Court of Appeals, upon the initial argument of this case, was equally divided. It is impossible therefore to fairly complain that the appellant should have anticipated the decision of the Court of Appeals.

POINT IV

The Court of Appeals' failure to explicitly set forth the basis for rejecting challenges to the statute's validity cannot defeat this Court's jurisdiction.

The answer to appellee's statement that the Court of Appeals did not pass on the validity of the statutory sections in question is found in the decision of the Court. Appellee argues that the decision held that, *whether 716 was valid or not,* it was not intended to apply to certain disputes. The appellee thus asks that the decision of the Court of Appeals be read as saying either that (i) Section 716 is invalid and doesn't apply, or that (ii) Section 716 is valid and does not apply. It is impossible to read the opinion of the Court of Appeals as saying anything other than the statute is valid but does not apply to the facts presented. To suggest that the Court did not pass

upon the validity of the section, but made a determination as to whether or not it was applicable to a particular fact situation, is to impute a certain lapse of logic to the Court. If the statute was invalid, what difference would it have made whether or not it applied to the particular facts?

It is certainly the law that an appeal will lie under Section 1257(2) even though the state court is not explicit in overruling a challenge on federal grounds to the validity of the statute. As long as the statute is sustained, the court has necessarily rejected such an objection. Its silence in this respect is immaterial and cannot destroy the right to appeal. *Lawrence* v. *State Tax Commission*, 286 U. S. 276, 282-3.

The validity of a statute is also said to have been sustained within the meaning of 1257(2) when the state court holds the statute applicable to a particular set of facts, as against the contention that such application is invalid on federal grounds. This is true even though the statute on its face bears no federal impediment. *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282.*

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* In *Dahnke*, this Court said, in pertinent part:

"That the statute was not claimed to be invalid in toto and for every purpose does not matter. A statute may be invalid as applied to one state of facts and yet valid as applied to another . . . Besides a litigant can be heard to question a statute's validity only when and so far as it is being or about to be applied to his disadvantage . . . Neither does it matter on what ground the court upheld and enforced the statute. The provisions . . . show that in cases where the validity of a state statute is drawn in question because of alleged repugnance to the Constitution, the mode of review depends on the way in which the state court resolves the question . . . The provisions take no account of the particular grounds or reasons on which the decision is put." (at p. 289) (citations omitted)

CONCLUSION

For each of the reasons set forth above and in the Jurisdictional Statement, appellant respectfully submits that the motion to dismiss this appeal be denied.

Respectfully submitted,

STEPHEN C. VLADECK,
Attorney for Appellant,
165 West 46th Street,
New York, N. Y. 10036.

JUDITH P. VLADECK,
VLADECK, ELIAS, FRANKLE,
VLADECK & LEWIS,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

October Term, 1968.

OTTLEY, PRESIDENT, ET AL. *v.* LONG ISLAND COLLEGE HOSPITAL.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 1045. Decided April 21, 1969.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a properly presented federal question.